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No. 89-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

DEBBY CLARDY, as Executrix of the Estate of Eugene Clardy, deceased, and CLARDY REALTY, INC., *Petitioners*,

v.

MARTHA HOFFMAN SANDERS, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

Of Counsel:

MICHAEL B. BEERS
BEERS, ANDERSON, JACKSON & SMITH, P.C.
272 Commerce Street
Montgomery, AL 36104

JULIAN P. HARDY
PRITCHARD, MCCALL & JONES
1700 Financial Center
Birmingham, AL 35203

DEBORAH ALLEY SMITH
RIVES & PETERSON
1700 Financial Center
Birmingham, AL 35203

THEODORE J. BOUTROUS, JR.
GIBSON, DUNN & CRUTCHER
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5303

*THEODORE B. OLSON
LARRY L. SIMMS
GIBSON, DUNN & CRUTCHER
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5303
(202) 955-8500

KARON O. BOWDRE
RIVES & PETERSON
1700 Financial Center
Birmingham, AL 35203

Attorneys for Petitioners

**Counsel of Record*

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

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QUESTIONS PRESENTED

Unrestrained by any legislatively established limit on the amount of punishment it could inflict, the jury in this case imposed jointly on petitioners and another defendant not before this Court, and the Supreme Court of Alabama affirmed, a punitive damage award of $2,750,000 in connection with the wrongful death of respondent's daughter in an automobile accident in which petitioner Debby Clardy's husband also died. This case presents the following questions to this Court:

1. Whether the Due Process Clause of the Fourteenth Amendment acts as a check on undue jury discretion to award punitive damages in the absence of any express statutory limit and, if it does, what due process restrictions on the otherwise unfettered discretion of juries to inflict punitive damages are required by that Clause.

2. Whether the Due Process Clause of the Fourteenth Amendment precludes the imposition of a single punishment on multiple defendants for a single instance of wrongful conduct without regard to their relative culpability.*

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* All the parties to this case in the court below are named in the caption. Petitioner Clardy Realty, Inc. has no parent, nonwholly owned subsidiary or affiliate.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

In *Aetna Life Insurance Co.* v. *Lavoie*, 475 U.S. 813, 828-29 (1986), the Court announced that the question whether the "lack of sufficient standards governing punitive damage awards in Alabama violates the Due Process Clause of the Fourteenth Amendment" raises an "important issue[] which, in an appropriate setting, must be resolved. . . ." Less than three months ago, the Court (and individual Justices) reiterated the proposition that defendants in civil actions brought by private plaintiffs may not be subjected to punishment in and by the courts of a State in the absence of due process, but left to another day the question whether the Due Process Clause restricts jury discretion to award unlimited punitive damages in the absence of legislatively im-

posed restraints. *Browning-Ferris Industries of Vermont, Inc.* v. *Kelco Disposal, Inc.*, 109 S. Ct. 2909, 2921 (1989). This case presents the Court with the opportunity to decide what protections the Constitution affords to civil litigants exposed to unlimited, state-imposed, jury-assessed monetary punishments in the form of punitive damages and to do so on a record fully developed on this question in the trial court and the Supreme Court of Alabama. This case also presents the question whether the practice of imposing punitive damages on multiple defendants jointly and severally—a practice characterized as unjust by this Court almost a century ago but one to which the court below and those of several other States still cling—comports with the Due Process Clause.

That the Court should resolve these questions in a case from the courts of Alabama is particularly appropriate in that the Alabama legislature has, only recently, deliberately chosen not to place any limit on the amount of punitive damages that may be inflicted in certain classes of cases, including cases like the case at bar, and because the Supreme Court of Alabama has, very recently, asserted that in some cases Alabama juries should be and are free to impose punitive damages in sums that will literally destroy a defendant.

OPINIONS AND ORDERS BELOW

The opinion of the Supreme Court of Alabama affirming the judgment of the trial court and expressly rejecting petitioners' federal constitutional challenges to the $2,750,000 punitive damage award is unreported and is reproduced in App. A, 1a-13a. The September 8, 1989 order of that court denying petitioners'

Application for Rehearing is unreported and is reproduced in App. B, 14a.[1] The opinion of the trial court denying petitioners' post-trial motions is unreported and is reproduced in App. C, 15a-16a.

JURISDICTION

The June 23, 1989 decision of the court below expressly rejected petitioners' Due Process Clause challenges to the punitive damage award. That court denied petitioners' Application for Rehearing on September 8, 1989. This Petition is being filed within ninety days of the denial of that Application. This Court has jurisdiction over this case pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Due Process Clause of the Fourteenth Amendment provides, in pertinent part:

> [N]or shall any State deprive any person of . . . property, without due process of law. . . .

2. *Ala. Code* § 6-5-391 (1975) provides, in pertinent part:

> When the death of a minor child is caused by the wrongful act, omission or negligence of any person,. . . the mother. . . may commence an action, and in any case shall recover such damages as the jury may assess. . . .

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[1] On September 11, 1989, petitioners applied to Kennedy, Circuit Justice, for a stay of the judgment. No order had been issued in connection with that application as of the date of the filing of this Petition.

STATEMENT OF THE CASE

A. Statement of the Facts

This case arose out of a vehicular accident that occurred on August 30, 1986. In that accident, the drivers of the two vehicles directly involved—Eugene Clardy, the husband of petitioner Debby Clardy, and Norma Hoffman, the minor daughter of respondent—were killed. Respondent brought suit against petitioners[2] under *Ala. Code* § 6-5-391, which authorizes suits to recover for wrongful death. This statute has been authoritatively construed by the court below to permit recovery of only punitive, not compensatory, damages.

At trial, it was established that Mr. Clardy had a blood alcohol level of .21% at the time of the accident, that he had been racing with another vehicle driven by defendant James C. Kervin at approximately 80 m.p.h., and that Mr. Clardy's vehicle was in Norma Hoffman's lane when it struck her vehicle head-on. The jury returned a punitive damage verdict of $2,750,000 which, under existing Alabama law, constituted a single verdict for which all three defendants found liable—Mr. Clardy's estate, Clardy Realty, Inc., and James C. Kervin—are jointly and severally liable. Mr. Kervin filed no post-trial motion and took no appeal from that verdict.

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[2] Also named as defendants in the original complaint and an amended complaint respectively were the driver of a third vehicle involved in the accident, James C. Kervin, and his father, John H. Kervin. The father was named in an amended complaint as a defendant on the theory that he had negligently entrusted a vehicle to his son. The jury found in favor of the father. Petitioner Clardy Realty, Inc., was also added as a defendant in that amended complaint.

B. Decision and Presentation of the Federal Questions

1. *Decision of the Federal Questions*

In a section of its opinion entitled "Constitutional Grounds," the court below found "no constitutional basis for reversal" of the punitive damage award at issue. This summary rejection of petitioners' federal (and state) constitutional challenges to the punitive damage award was followed by citations to two recent opinions of that court issued in *Industrial Chemical & Fiberglass Corp.* v. *Chandler*, Nos. 86-381, -385 (Ala. June 23, 1989) (on rehearing), and *Central Alabama Electric Cooperative* v. *Tapley*, No. 87-1188 (Ala. May 12, 1989). (Those opinions are unreported and are reproduced in App. D, 17a-31a, and App. E, 32a-58a, respectively.)

In *Industrial Chemical*, the court below noted that it had rejected Industrial Chemical's Eighth Amendment challenge to the two $2,500,000 punitive damage awards at issue in that wrongful death case in a prior opinion, App. D, 18a, and went on to reject Industrial Chemical's argument "that the lack of standards for judges and juries to follow in imposing punitive damages under Alabama's wrongful death statute violate[s] . . . the Due Process Clause of the Fourteenth Amendment to the United States Constitution." App. D, 18a. The court below explained its conclusion as follows:

> If the existence of malice, wantonness, or negligence is supported as fact by evidence in the record, "we must see no offense to the Constitution, and no deprivation of any constitutional right of [the defendant] in committing the assessment of such damages, *in-*

> *cluding the amount to be allowed,* to the sound discretion of the jury."

App. D, 24a, *quoting Toole* v. *Richardson-Merrell, Inc.*, 251 Cal. App. 2d 689, 719, 60 Cal. Rptr. 398 (1967) (emphasis added). The court below went on to express substantial doubt that any specific limit could be placed on the amount of punitive damages the jury might award without violating the right to a jury trial guaranteed by Alabama's constitution. App. D, 24a-25a & n.2.[3]

According to the court below in its *Industrial Chemical* decision, the only "process" due to defendants against whom punitive damages may be or have been assessed is the opportunity to challenge the excessiveness of such awards on common law grounds post-trial or on appeal:

> In sum, "fundamental fairness" requires that the defendant be given the opportunity to present proof to the trial court during post-judgment review of the verdict that the punitive award is unreasonable, disproportionate, or economically destructive. . . .

App. D, 28a-29a. In describing this "process," the court below left no doubt that Alabama juries continue to be the final arbiters of punitive damages in that State, reaffirming its view expressed in its initial opinion issued in *Industrial Chemical* that the Ala-

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[3] As discussed *infra*, this reasoning of the court below suggests that it would hold unconstitutional any limit that might be prescribed by the Alabama legislature on the amount of punitive damages that a jury might award in any particular type of case in which punitive damages are recoverable.

bama punitive damage system is *ad hoc* and subjective, stating that:

> "a trial court may not conditionally reduce a jury verdict merely because it believes the verdict overcompensates the plaintiff; that a trial court may not substitute its judgment for that of the jury; *and that there can be no ironclad rule in considering the adequacy or excessiveness of a verdict. Each case must be determined by its own facts and on its own merits.*"

App. D, 29a (quoting initial opinion; emphasis added on rehearing).

In *Central Alabama*, the court below had rejected the argument, which it characterized as invoking "substantive due process," that punitive damages could not be awarded in the absence of "objective criteria" to guide the jury. App. E, 38a. In doing so, that court stated its view that in cases "involving the most egregious conduct, juries *should be entitled to punish defendants* so severely as *to destroy them*; justice demands that." App. E, 41a-42a (emphasis added).

The decision by the court below of petitioners' challenges to the punitive damage award under the Due Process Clause of the Fourteenth Amendment, both directly and by incorporation of its recent decisions in *Industrial Chemical* and *Central Alabama*, leaves no doubt that the court below regarded petitioners' federal challenges as properly presented and that it decided them on the merits. As petitioners demonstrate *infra*, there is also in this case a fully developed record in both the trial court and the court below

upon which this Court can address these important due process questions.[4]

2. *The Record on Which the Federal Questions Were Decided Below*

In *Browning-Ferris*, the Court expressed reservations regarding the exercise of its discretionary jurisdiction to decide the constitutionality under the Due Process Clause of a punitive damage award "in the absence of a record on the due process point developed in the [trial and appellate courts]." 109 S. Ct., at 2921 n.23. Such a record fully exists in this case.[5]

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[4] Because no question similar to petitioners' due process challenge to the imposition on them of joint and several liability for a single punitive damage award was involved in either *Industrial Chemical* or *Central Alabama*, it is apparent that the court below did not believe that distinct federal question to be worthy of any additional comment. That issue was, however, necessarily decided by the court below in its broad rejection of all of petitioners' federal constitutional challenges to the punitive damage award and, as discussed *infra*, was raised contemporaneously with petitioners' other federal challenges at each stage of the proceedings in the trial court and before the court below. *See also* note 22 and accompanying text, *infra*.

[5] At each stage of this litigation, petitioners also challenged the imposition of punitive damages under the Excessive Fines Clause of the Eighth Amendment. Given the apparent breadth of the holding of this Court in *Browning-Ferris* on the merits of the Excessive Fines Clause question, petitioners place primary reliance in this Petition on the Due Process Clause. However, as pointed out in the text *infra* at 17, at least one member of the court below has asserted, and none have apparently contradicted, the proposition that a punitive damage plaintiff in Alabama acts as an "agent of the state" in seeking punitive damages. Thus, the Excessive Fines Clause may be applicable to this case. *See also* note 17 and accompanying text, *infra*.

In their amended answer, petitioners contended "that the imposition of punitive damages against them under Alabama law violates their rights under the due process clauses of the Fourteenth Amendments to the Alabama and United States Constitutions," and that "the imposition of purely punitive damages, jointly and severally, violates their rights under the due process clauses of the Fourteenth Amendments to the Alabama and United States Constitutions." *See* App. F, 59a-60a. At the conclusion of respondent's presentation of her case, petitioners moved for a directed verdict and reiterated the foregoing due process objections to the award of punitive damages. *See* App. G, 61a-65a. These federal and state constitutional due process challenges were renewed in a motion for directed verdict after all of the evidence was in. *See* App. H, 66a-68a. After the verdict, these due process challenges were reiterated in petitioners' post-trial motions and briefs. Petitioners specifically argued, *inter alia*, that: (1) the lack of clear standards governing the imposition of punitive damages in Alabama raised important Due Process Clause questions, citing *Aetna Life Insurance Co.* v. *Lavoie*, 475 U.S. 813, 828-29 (1986); (2) subjecting defendants to unlimited punitive damage awards constituted arbitrary and capricious punishment in violation of the Due Process Clause; and (3) indiscriminate imposition of joint and several punitive damage liability without regard to individual culpability violated the Due Process Clause. App. I, 69a-73a.

At the hearing on petitioners' post-trial motions on March 31, 1988, petitioners renewed these challenges orally. App. J, 76a-82a. The trial court observed that petitioners had expressed their constitutional chal-

lenges "from the very first" (App. J, 76a), but indicated that the constitutional challenges were not within its power to resolve: "I don't think that I am in a position to decide that that is unconstitutional." App. J, 76a.[6]

In their opening brief in the court below, petitioners argued, *inter alia*, that their rights under the Due Process Clause of the Fourteenth Amendment "were violated in this case by the authority granted to and exercised by the jury to award punitive damages, to impose a fine to punish and deter, without *any* legislatively determined or judicially articulated clear standards as to whether a fine was warranted or the amount of or limits of any such punishment." App. K, 84a. (The pertinent portions of petitioners' opening brief are reproduced in App. K, 83a-95a.) Respondent joined issue, arguing, *inter alia*, that no such limits could be imposed on the unfettered discretion of juries

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[6] Respondent made no argument to the trial court at any time that petitioners had not raised their federal constitutional challenges in a timely fashion. Respondent did argue to the court below that petitioners' federal challenge was untimely because it was not included in the pre-trial order. That argument was necessarily rejected by the court below in reaching the merits of petitioners' federal constitutional challenges and is patently frivolous under that court's decision in *Stump* v. *Bullock*, 527 So. 2d 708, 709-10 (Ala. 1988) (pre-trial orders effective only when trial judge may allow and disallow amendments to pleadings, including answers, filed subsequent to pre-trial conference). As this Court is fully aware, the Supreme Court of Alabama leaves no doubt when it determines that federal constitutional challenges to punitive damage awards have not been properly presented. *See Alabama Power Co.* v. *Capps*, 519 So. 2d 1328 (Ala.) (federal constitutional challenge to punitive damage award in wrongful death case must be raised prior to verdict), *app. dism'd*, 108 S. Ct. 1723 (1988).

without violating the rights of plaintiffs to a jury trial under the Alabama Constitution and the Seventh Amendment. App. L, 96a-99a. *See* note 3 and accompanying text, *supra*.

Finally, in their Application for Rehearing petitioners brought this Court's decision in *Browning-Ferris* to the attention of the court below and pointed out that at least five Justices of this Court had, in *Browning-Ferris* and *Bankers Life and Casualty Co. v. Crenshaw*, 108 S. Ct. 1645 (1988), indicated serious constitutional concerns regarding whether the imposition by juries of punitive damage awards in the absence of appropriate standards and legislatively fixed limits is consistent with the Due Process Clause of the Fourteenth Amendment. App. M, 100a-07a. The court below denied rehearing without a court opinion.

In no case yet to come before this Court has the record been as fully developed with respect to attempts by defendants to secure the guarantees of the Due Process Clause of the Fourteenth Amendment in the face of the threat and the actuality of a punitive damage award uncontrolled by any meaningful legislative or judicial restraints. Indeed, petitioners urged these arguments time and again on a trial court that believed that only higher judicial authority could address constitutional challenges to a system of punishment that had been blessed repeatedly by the Supreme Court of Alabama and allowed to go unrestrained by the Alabama legislature.

Petitioners renewed and expanded upon these contentions in the court below, but that court simply concluded that, "we find no constitutional basis for reversal." App. A, 13a. Petitioners could have done

no more to bring to this Court a fully developed record upon which to decide these important questions.

REASONS FOR GRANTING THE WRIT

"Awards of punitive damages are skyrocketing." *Browning-Ferris*, 109 S. Ct., at 2924 (O'Connor, J., concurring in part and dissenting in part). This phenomenon is observable not only in wrongful death cases in Alabama, in which multi-million dollar punitive damage awards are affirmed routinely,[7] but in a broad spectrum of civil litigation in which punitive damages have become available in the last decade. This spectrum includes an insurance "bad faith" punitive damage award of $22,500,000,[8] an award of $30,000,000 in punitive damages for wrongful termination of employees,[9] an award of $10,000,000 in a products liability case[10] and awards of $14,000,000 and $15,000,000 affirmed on appeal in California in 1988 in commercial contract cases.[11] These represent a fractional sample of a phenomenon that is rapidly

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[7] *E.g., Industrial Chemical & Fiberglass Corp.* v. *Chandler*, Nos. 86-381, -385 (Ala. Jan. 16, 1989) (after remand) (affirming two punitive damage awards of $2,500,000 each in wrongful death cases); *Black Belt Wood Co.* v. *Sessions*, 514 So. 2d 1249 (Ala. 1986) ($3,500,000 punitive damage award).

[8] *Republic Insurance Co.* v. *Hires*, No. 19426 (Nev. argued June 21, 1989).

[9] *Brooks* v. *Hilton Casinos, Inc.*, No. CV LV-84-436 LDG (D. Nev. Aug. 30, 1989) (final judgment).

[10] *Ford Motor Co.* v. *Durrill*, 714 S.W.2d 329 (Tex. App. 1986).

[11] *Metromedia, Inc.* v. *April Enterprises, Inc., cert. denied*, 109 S. Ct. 3242 (1989) ($14,000,000 punitive damage award); *Eaton Corp.* v. *The PKL Companies, Inc., cert. denied*, 109 S. Ct. 1933 (1989) ($15,000,000 punitive damage award).

overpowering the civil justice system in the United States and affecting the marketing of products and the cost of doing business throughout the United States.[12]

The size of these and other punitive damage verdicts should, standing alone, be of concern to this Court because there is, as pointed out in *Browning-Ferris*, "authority in [this Court's] opinions for the view that the Due Process Clause places outer limits on the size of a civil damages award made pursuant to a statutory scheme. . . ." 109 S. Ct., at 2921. Petitioners' primary submission, however, shall be directed to two virtually universal characteristics of the punitive damage systems in place in Alabama and most jurisdictions that "reveal[] a deeper flaw: the fact that punitive damages are imposed by juries guided by little more than an admonition to do what they think is best." *Id.*, at 2923 (Brennan, J., concurring).

A. The Court Should Grant Review To Decide the Extent to Which the Due Process Clause of the Fourteenth Amendment Acts as a Check on Undue Jury Discretion To Inflict Punitive Damages in Civil Actions Involving Private Parties

The stark reality of the punitive damage system identified and articulated by Justice Brennan in his concurring opinion in *Browning-Ferris* should be examined within a due process framework that focuses,

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[12] *See Browning-Ferris*, 109 S. Ct., at 2924 (O'Connor, J., concurring in part and dissenting in part); Brief of the Pharmaceutical Manufacturers Ass'n and The American Medical Ass'n as *Amici Curiae*, at 5-23, in *Browning-Ferris; Amicus Curiae* Brief of the United States Chamber of Commerce, *et al.*, 11-13, in *Browning-Ferris*.

at least initially, not on the issue of due process "substantive" limits on these punishments but, rather, on what are more aptly characterized as procedural due process rights which are, or at least should be, guaranteed to any person potentially subject to punishment in any legal system governed by the rule of law.

Consideration of these important questions in this case is particularly appropriate because the Alabama legislature has only recently (June 11, 1987) enacted legislation on the subject of punitive damages that was deliberately made inapplicable to punitive damage awards imposed in wrongful death cases. In that legislation, the Alabama legislature, *inter alia*, placed a limit of $250,000 on punitive damage awards in some types of cases,[13] imposed certain procedural requirements on the trial of punitive damage cases,[14] and instructed appellate courts that no presumption of correctness was to attach to punitive damage awards on appeal.[15]

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[13] Under *Ala. Code* § 6-11-21 (Cum. Supp. 1988), punitive damage awards in other than wrongful death cases may not exceed $250,000 unless (1) a pattern or practice of intentional wrongful conduct is proved; (2) conduct involving "actual malice" is proved; or (3) the conduct at issue constitutes libel, slander or defamation.

[14] Under *Ala. Code* § 6-11-20 (Cum. Supp. 1988), punitive damages may be awarded only on the basis of "clear and convincing" evidence that the defendant "consciously or deliberately engaged in oppression, fraud, wantonness, or malice with regard to the plaintiff."

[15] Under *Ala. Code* § 6-11-24 (Cum. Supp. 1988), appellate courts are told, "On appeal, no presumption of correctness shall apply to the amount of punitive damages awarded."

Because, as indicated above, the court below has suggested in *Central Alabama* that the constitutional right of Alabama plaintiffs to a jury trial might place the validity of these statutory curbs on jury discretion in jeopardy under Alabama's constitution, it is especially important for this Court to announce in this case the limits placed by the federal constitution on the punitive damage system in Alabama. Because, in enacting this recent "tort reform" legislation, the Alabama legislature explicitly exempted wrongful death actions from *all* of its provisions,[16] this case is in any event an appropriate vehicle for resolution of the due process issues it presents. The punitive damage award in this case comes to this Court in light of a *fresh* judgment of the Alabama legislature that, in this and several other classes of cases, there should not be any statutory limit on the jury's discretion. Moreover, as noted above, Alabama's highest court has announced that in some cases it would allow juries "to punish defendants so severely as to destroy them." App. E, 42a.

Petitioners shall argue on the merits that the threshold procedural right violated by the punitive verdict in this case and the system that produced it is the absence of any notice to those subject to the jurisdiction of the Alabama courts regarding the level of punishment that may be imposed for the misconduct involved. If the State of Alabama had sought to collect a criminal fine from Mr. Clardy (had he survived the accident) in an amount to be determined

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[16] *Ala. Code* § 6-11-29 (Cum. Supp. 1988). In addition, under § 6-11-30 (Cum. Supp. 1988), none of the provisions of the 1987 legislation "shall. . . affect the rights of any person if such rights accrued prior to June 11, 1987."

by a jury without any statutory limits, the State's attempt would surely be forbidden by the Due Process Clause. *See United States* v. *Batchelder*, 442 U.S. 114, 123 (1979) ("vague sentencing provisions may pose constitutional questions if they do not state with sufficient clarity the consequences of violating a given criminal statute"). In administering punishment in criminal cases, there is simply no credible argument against the principle that the law must "fairly and clearly define. . . the punishment which can be administered." *Berra* v. *United States*, 351 U.S. 131, 139-40 (1956) (Black, J., dissenting).

Likewise had Alabama attempted to impose a civil fine on Mr. Clardy or petitioners, it would appear that these same due process principles would be applicable.[17] Indeed, it seems inconceivable that this Court would uphold a statute enforced by a State that expressly left with a jury or a judge the right, after determining liability on a standard of negligence (as provided by § 6-5-391) or some other subjective standard, to impose a fine solely in their discretion. *See Giaccio* v. *Pennsylvania*, 382 U.S. 399 (1966). As this Court stated in *United States* v. *Halper*, 109 S. Ct. 1892 (1989), in applying the Double Jeopardy Clause to the punitive component of an ostensibly "civil" fine, "a civil as well as a criminal sanction constitutes punishment when the sanction as applied in the individual case serves the goals of punishment." *Id.*, at 1901-02. *See Browning-Ferris*, 109 S. Ct., at 2920 n.21. Under *Halper*, punishment is constitutionally distinct from damages constituting compensation

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[17] Moreover, the excessiveness of any such fine seemingly would be subject to scrutiny under the Eighth Amendment. *See Browning-Ferris*, 109 S. Ct., at 2914, 2916, 2918 & 2920.

and necessarily implicates due process concerns quite discrete from those invoked by purely compensatory damages.

In fact, "punitive damages" is a misnomer. The award is a state-imposed punishment that serves no compensatory function but, rather, serves the State's deterrent objectives. Punitive damages are therefore generically in the class of criminal punishments and civil fines and not akin at all to damages. "Since punitive damages are not to compensate a victim for loss but to punish and deter, *the state alone* is considered the true party plaintiff, and *in seeking punitive damages, a plaintiff is an agent of the state* and not a victim." *Tatum* v. *Schering Corp.*, 523 So. 2d 1042, 1048 (Ala. 1988) (Houston, J., dissenting) (emphasis added). Thus, the same due process standards that apply to criminal and civil fines apply equally to their mis-named cousin.

In addition to depriving petitioners and other defendants in punitive damage cases of their procedural due process right to fair notice of the punishment that may be administered for prohibited conduct, the absence of legislatively established limits or standards puts the essentially legislative task of determining the amount of punishment necessary to fulfill society's goals of retribution and deterrence[18] into the hands of civil juries. Those juries, on an *ad hoc* and purely subjective basis, enact and impose a maximum punishment in each case that comes before them. The court below has made quite clear that under Ala-

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[18] *See Gore* v. *United States*, 357 U.S. 386, 393 (1958) ("views... regarding severity of punishment... are peculiarly questions of legislative policy").

bama's punitive damage system, this task is for the jury to perform. In the view of the Supreme Court of Alabama, due process has nothing to do with the random assessment of enormous and capricious punishments by juries:

> The identical case tried to different juries will likely produce different results, but that does not necessarily smack of a lack of fundamental fairness. That is inherent in the nature of juries, given the imperfection of man and his system of justice. Some discretion must be afforded to juries to assess punitive damages as they see fit.

Central Alabama, App. E, 42a.

Thus, the court below exalts one of the very characteristics of the punitive damage system that renders it incompatible with the Due Process Clause of the Fourteenth Amendment. This Nation chose to implement a system of laws, particularly as regards the infliction of punishment, that minimizes the chances that punishment will be inflicted arbitrarily, capriciously, randomly, unpredictably, unequally or excessively. That the punitive damage system crosses all of these constitutional boundaries drawn by the Due Process Clause is obvious; there is virtually no dissent from the proposition that punitive damage awards, as the award in the case at bar, are "frequently based upon the caprice and prejudice of jurors." *Smith* v. *Wade*, 461 U.S. 30, 59 (1983) (Rehnquist, J., dissenting).

As stated by Justice O'Connor, the "grant [to a jury] of wholly standardless discretion to determine the severity of punishment appears inconsistent with

due process." *Bankers Life and Casualty Co.* v. *Crenshaw*, 108 S. Ct., at 1656 (O'Connor, J., concurring in part). Due process demands that juries be confined in their ability to administer punishment by the deliberative judgments of legislatures regarding: (1) the amount of punishment necessary to secure society's interests in retribution and deterrence; and (2) the standards under which the jury is to arrive at an appropriate punishment in a particular case. This question is important, implicates a broad spectrum of civil litigation in which punitive damages are available, and should be decided in this case.

B. The Court Should Grant Review to Decide Whether Holding Multiple Defendants Jointly and Severally Liable for Punitive Damages Regardless of Their Relative Culpability Violates the Due Process Clause of the Fourteenth Amendment

By the time this Court decided *Washington Gas Light Co.* v. *Lansden*, 172 U.S. 534 (1899), the concept of joint and several liability of multiple defendants for compensatory damages in tort actions permeated the common law. *Id.*, at 552. Justice Peckham, in writing for the *Lansden* Court, nevertheless observed that joint liability for punitive damages would not be so easily accepted. Noting that punitive damages are "not a mere matter of compensation" for the plaintiff, *id.*, at 553, he wrote: "While all defendants joined are liable for compensatory damages, there is no justice in allowing the recovery of punitive damages in an action against several defendants, based upon evidence of the wealth and ability to pay such damages on the part of one of the defendants only." *Id.*[19]

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[19] Although *Lansden* specifically concerned the admissibility of

In the ninety years since *Lansden*, a growing consensus has developed among the States that neither justice nor logic can abide the nonapportionment among defendants of punitive damages. Beginning with the Ohio Supreme Court in 1903, *Mauk* v. *Brundage*, 68 Ohio St. 89, 67 N.E. 152 (1903), and continuing through a 1988 decision of the Vermont Supreme Court, *Coty* v. *Ramsey Assocs., Inc.*, 149 Vt. 451, 546 A.2d 196 (1988), a substantial majority of the States that have considered the question have ruled that defendants should not be held jointly and severally liable for punitive damages.[20] As the Mary-

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evidence establishing the wealth of one of several defendants prior to the assessment of punitive damages and the constitutionality of nonapportionment of punitive damages was not at issue, it represents a clear statement by this Court that rudimentary justice requires that punitive damages, unlike compensatory damages, be tailored to the situation and culpability of each individual *defendant*.

[20] *Rubi* v. *Transamerica Title & Insurance Co.*, 131 Ariz. 403, 641 P.2d 891 (Ct. App. 1981); *Thomson* v. *Catalina*, 205 Cal. 402, 271 P. 198 (1928); *Shields* v. *Martin*, 109 Idaho 132, 706 P.2d 21 (1985); *Louisville & Nashville R.R.* v. *Roth*, 130 Ky. 759, 114 S.W. 264 (1908); *Embrey* v. *Holly*, 293 Md. 128, 442 A.2d 966 (1982); *Nelson* v. *Halvorson*, 117 Minn. 255, 135 N.W. 818 (1912); *State ex rel. Hall* v. *Cook*, 400 S.W.2d 39 (Mo. 1966); *Edquest* v. *Tripp & Dragstedt Co.*, 93 Mont. 446, 19 P.2d 637 (1933) (dictum); *Hotel Riviera, Inc.* v. *Short*, 80 Nev. 505, 396 P.2d 855 (1964); *Sierra Blanca Sales Co.* v. *Newco Industries, Inc.*, 88 N.M. 472, 542 P.2d 52 (Ct. App. 1975), *rev'd on other grounds*, 89 N.M. 187, 548 P.2d 865 (1976); *Latasa* v. *Aron*, 59 Misc. 26, 109 N.Y.S. 744 (Sup. Ct. 1908); *McCurdy* v. *Hughes*, 63 N.D. 435, 248 N.W. 512 (1933); *Fredeen* v. *Stride*, 269 Or. 369, 525 P.2d 166 (1974); *Johnson* v. *Atlantic Coast Line R.R. Co.*, 142 S.C. 125, 140 S.E. 443 (1927); *Huckeby* v. *Spangler*, 563 S.W.2d 555 (Tenn. 1978); *St. Louis & South West Ry. Co. of Texas* v. *Thompson*, 102 Tex. 89, 113 S.W. 144 (1908); *Free-*

land Court of Appeals commented after considering the various state court decisions and this Court's opinion in *Lansden*:

> [W]hile a defendant who is least culpable may remain liable for all the compensatory damages suffered by plaintiff, given the purpose of a punitive award, there is no justice in allowing similar recovery of such damages in an action against several defendants based upon evidence of the wealth and blameworthiness of one other than he who must pay the exemplary award. . . . Accordingly, we hold that it is entirely proper to permit a jury to apportion punitive damages among multiple defendants. . . .

Embrey v. *Holly*, 293 Md. 128, 442 A.2d 966, 974 (1982).

Despite the substantial number of States that have joined the consensus recognizing the inherent injustice of joint and several liability for punitive damages, a few States, including Alabama, cling to the view that it is appropriate to impose punitive damages on this basis.[21] The Supreme Court of Alabama, in particular,

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man v. *Sproles*, 204 Va. 353, 131 S.E.2d 410 (1963) (dictum). *See also Remeikis* v. *Boss & Phelps, Inc*, 419 A.2d 986 (D.C. App. 1980). For two courts applying "federal law of damages" in a civil rights context, see *McFadden* v. *Sanchez*, 710 F.2d 907 (2d Cir.), *cert. denied*, 464 U.S. 961 (1983), and *Davidson* v. *Dixon*, 386 F. Supp. 482 (D. Del. 1974), *aff'd*, 529 F.2d 511 (3d Cir. 1975).

[21] *Bell* v. *Riley Bus Lines*, 257 Ala. 120, 57 So. 2d 612 (1952); *Curtis* v. *Partain*, 272 Ark. 400, 614 S.W.2d 617 (1981) (plaintiff who seeks punitive damages against only one of several defendants waives right to claim any punitive damages); *Walker*

has heard extensive argument on the issue, *Tatum* v. *Schering Corp.*, 523 So. 2d 1042, 1043 (Ala. 1988), but has declined to alter its position: "Although highly persuasive arguments can be made that prior cases of this Court were incorrectly decided, this Court has resolutely refused to change the rule of law that punitive damages are not apportionable among joint tortfeasors." *Id.*[22] The *Tatum* court went on to point out that that case represented the second time in as many terms that it had rejected a challenge to the non-apportionment rule. *Id.*, *citing Black Belt Wood Co.* v. *Sessions*, 514 So. 2d 1249 (Ala. 1986). In *Black Belt*, the court below acknowledged that, "[o]f course, apportionment does result in a judgment's being rendered against each defendant individually and splits up damages in proportion to the separate culpability of each defendant, and, as a result, penalties conform more closely to the culpability of the offender. . .," but concluded simply that "Alabama has not followed that rule." 514 So. 2d, at 1263 (citation omitted). Clearly, then, this unjust and unconstitutional rule will only be overturned if this Court grants review

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v. *Bishop*, 169 Ga. App. 236, 312 S.E.2d 349 (1983); *Pardridge* v. *Brady*, 7 Ill. App. 639 (1881); *Sieben* v. *Sieben*, 231 Kan. 372, 646 P.2d 1036 (1982); *Interstate Co.* v. *Garnett*, 154 Miss. 325, 122 So. 373, *sugg. of error overruled*, 154 Miss. 359, 122 So. 756 (1929); *Richette* v. *Solomon*, 410 Pa. 6, 187 A.2d 910 (1963); *Young* v. *Aylesworth*, 35 R.I. 259, 86 A. 555 (1913).

[22] The frequency with which the court below continues to be confronted with this issue notwithstanding its apparently unshakable position may well explain the failure of the court to address the merits of this question expressly in its opinion in this case. *See* note 4, *supra*.

of this question and, after full consideration, directs the court below to abandon this well-entrenched rule.[23]

As this Court has established, the Due Process Clause "imposes on the States the standards necessary to ensure that judicial proceedings are fundamentally fair." *Lassiter* v. *Department of Social Services of Durham County*, 452 U.S. 18, 33 (1981). This Court has also made clear that the Due Process Clause protects both plaintiffs and defendants in civil litigation, *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 429 (1982), specifically guaranteeing a litigant "the opportunity to present his case and have its merits fairly judged." *Id.*, at 433.

That the nonapportionment rule for punitive damages violates the Due Process Clause and deserves to be stricken down is almost self-evident. As one of the three dissenters in *Tatum* noted:

> A recovery of punitive damages by execution from a defendant who does not deserve the penalty or who deserves a lesser penalty based upon his or her fault, while others who are truly culpable and deserve the penalty go unpunished raises the spectre of unconstitutionality, *Aetna Life Insurance Co.* v. *Lavoie*, 475 U.S. 813, 106 S. Ct. 1580, 1589, 89 L. Ed. 2d 823 (1986), and is not consistent with the policy underlying punitive damages.

523 So. 2d, at 1049 (Houston, J., dissenting).

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[23] "Alabama does not permit contribution among joint tortfeasors. . . . Therefore, in Alabama, the punishment of defendants, when there are more than one, remains where the plaintiff imposes it." *Tatum*, 523 So. 2d, at 1049 (Houston, J., dissenting).

As Justice Houston intimated in dissent in *Tatum*, the nonapportionment rule flies in the face of this Court's standard of fundamental fairness. A punitive damage defendant in Alabama may be exposed to punishment based primarily on the conduct of other persons, and the plaintiff may collect from that defendant rather than a more impecunious or perhaps judgment-proof co-defendant. Certainly it would be unthinkable to require juries or judges in criminal cases to impose a single sentence against multiple defendants and then allow the victim of the crime to designate one defendant to suffer all or most of the punishment in the place of the others. If punishment may not be dispensed in that fashion in criminal cases, it seems obvious that punishment may not be imposed in such a fashion in civil cases. *Cf. United States* v. *Halper, supra.*

This Court has often acknowledged that punitive damages serve to punish defendants: "The Court's cases abound with the recognition of the penal nature of punitive damages." *Browning-Ferris*, 109 S. Ct., at 2932 (O'Connor, J., concurring in part and dissenting in part) (citing eight supporting cases dating from 1893 through 1987). *See also United States* v. *Halper*, 109 S. Ct., at 1901 ("punitive damages. . . serve punitive goals"). In this regard, Alabama is in accord with this Court and with the other States that allow punitive damages. *See, e.g., Green Oil Co.* v. *Hornsby*, 539 So. 2d 218 (Ala. 1989).

Given the "penal nature" of punitive damages, due process requires that the punishment fit the particular defendant's culpability. It is axiomatic that, "[i]n our jurisprudence, guilt is personal." *Scales* v. *United*

States, 367 U.S. 203, 224 (1961). *See also Korematsu* v. *United States*, 323 U.S. 214, 243 (1944) (Jackson, J., dissenting); *Hirabayashi* v. *United States*, 320 U.S. 81, 107-08 (1943) (Douglas, J., concurring). A corollary to the personal quality of guilt is that punishment be tailored to fit the guilt. As the Court has noted, "[t]he focus [of punitive damages] is on the character of the tortfeasor's conduct." *Smith* v. *Wade*, 461 U.S., at 54.

After considering *Smith* v. *Wade* and surveying the several States' decisions on apportionment of punitive damages, the Second Circuit concluded in a federal civil rights context that, "[t]he degree of appropriate punishment and the extent to which deterrence may be achieved at an individual's expense are *obviously matters appropriate for individualized determination.*" *McFadden* v. *Sanchez*, 710 F.2d 907, 913 (2d Cir.), *cert. denied*, 464 U.S. 961 (1983) (emphasis added). The Due Process Clause of the Fourteenth Amendment compels that same conclusion.

This Court has previously enumerated three factors that aid in identifying the "specific dictates of due process," *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976), and consideration of them here lends strong support to the need for this Court to review Alabama's nonapportionment rule. These factors are: (1) "the private interest that will be affected" by application of the rule; (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of . . . substitute procedural safeguards"; and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the . . . substitute procedural requirement would entail." *Id.* (citation

omitted). Even a cursory review of the impact of the nonapportionment rule reveals serious due process concerns.

The interest affected is deprivation of increasingly breathtaking quantities of property. The risk of an erroneous deprivation is significant and ubiquitous because any one defendant's exposure to punitive damages is left to the whim of the plaintiff and has absolutely no correlation to the defendant's relative culpability. The substitute safeguard of requiring apportionment would, in contrast, ensure that punishment and culpability go hand in hand. While requiring juries to apportion punitive damages would not increase either fiscal or administrative burdens on the State, it would surely enhance rather than diminish achievement of the State's twin goals of punitive damages: retribution and deterrence.[24] Although "due process" "has never been, and perhaps can never be, precisely defined," *Lassiter*, 452 U.S., at 24-25, it certainly would not appear to tolerate a procedure that is neither fair to individual defendants nor conducive to achievement of the asserted state goals.

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[24] As the South Carolina Supreme Court determined long ago:

> The rule of one verdict [for punitive damages] against all the defendants found guilty will almost always cause the entire punishment to fall upon one alone. The other defendants will then be freed and discharged from liability on the judgment, thus being enabled, notwithstanding the "example" of the verdict "for the public good," to wholly evade the penalty and defeat altogether the ends of justice.

Johnson v. *Atlantic Coast Line R.R. Co.*, 142 S.C. 125, 140 S.E. 443, 454-55 (1927).

As documented above, most courts that have considered the issue have determined that "reason and common sense," *Latasa* v. *Aron*, 59 Misc. 26, 109 N.Y.S. 744, 745 (Sup. Ct. 1908), as well as justice, *see, e.g., Thomson* v. *Catalina*, 205 Cal. 402, 271 P. 198, 200 (1928), require apportionment of punitive damages. Alabama and a small minority of other States have not followed this emerging consensus and, absent intervention by this Court, will not do so.

CONCLUSION

This case presents the appropriate vehicle for the Court's resolution of the important constitutional question left for "another day" by *Browning-Ferris*. Since the Court's decision in *Aetna Life Insurance Co.* v. *Lavoie* in April 1986, Alabama has had over three years to address, legislatively and judicially, the fundamental inequities in its punitive damage system. Especially in light of the recent and inadequate responses of Alabama's legislature and judiciary to the concerns that have been expressed repeatedly by this Court, this case should be afforded plenary consideration by the Court.[25]

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[25] *See also Combined Insurance Company of America* v. *Ainsworth*, No. 89-292, *pet. for cert. filed*, August 17, 1989, *stay granted*, June 15, 1989 (A-984).

September 14, 1989

Respectfully submitted,

Of Counsel:

MICHAEL B. BEERS
BEERS, ANDERSON, JACKSON & SMITH, P.C.
272 Commerce Street
Montgomery, AL 36104

JULIAN P. HARDY
PRITCHARD, MCCALL & JONES
1700 Financial Center
Birmingham, AL 35203

DEBORAH ALLEY SMITH
RIVES & PETERSON
1700 Financial Center
Birmingham, AL 35203

THEODORE J. BOUTROUS, JR.
GIBSON, DUNN & CRUTCHER
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5303

*THEODORE B. OLSON
LARRY L. SIMMS
GIBSON, DUNN & CRUTCHER
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5303
(202) 955-8500

KARON O. BOWDRE
RIVES & PETERSON
1700 Financial Center
Birmingham, AL 35203

Attorneys for Petitioners

**Counsel of Record*

APPENDICES

APPENDICES

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APPENDIX A

THE STATE OF ALABAMA - - JUDICIAL DEPARTMENT
THE SUPREME COURT OF ALABAMA
OCTOBER TERM, 1988-89

87-1070

Debby D. Clardy, as executrix of
the estate of Thomas Eugene Clardy, deceased;
and Clardy Realty, Inc.

v.

Martha Hoffmann Sanders

Appeal from Montgomery Circuit Court
(CV-87-448)

JONES, JUSTICE.

This appeal by the defendants, from an adverse judgment based on a jury verdict in a wrongful death case, raises the following issues: Whether the trial court erred 1) in denying Clardy Realty, Inc.'s motion for directed verdict on the grounds of insufficiency of the evidence and the inapplicability of the "successor corporation liability" doctrine; 2) in denying the defendants' constitutional challenge to Alabama's punitive damages award in wrongful death cases; and 3) in rejecting the defendants' post-judgment motion for a remittitur on non-constitutional grounds. We affirm.

Background Facts and Statement of the Case

Thomas Eugene Clardy and James K. Kervin were racing their automobiles late one evening. In an attempt to

pass, Clardy swung into the opposite lane and struck a car being driven in the opposite direction by Norma Hoffmann, a 16-year-old female. Both Clardy and Hoffmann were killed.

Clardy owned a real estate proprietorship called Clardy Realty. Following Clardy's death, Debby Clardy, the widow of Thomas Eugene Clardy, incorporated Clardy Realty. Mrs. Clardy was also named the executrix of her late husband's estate.

Originally, Martha Hoffmann Sanders, Norma's mother, filed a two-count complaint under Ala. Code 1975, § 6-5-391, against Mrs. Clardy, as the executrix of Clardy's estate, and against Kervin, alleging negligence and wantonness. Later, Mrs. Sanders amended her complaint to add as a defendant Clardy Realty, Inc., alleging that Clardy was acting within the scope of his authority at the time of the accident, and to add Kervin's father, under a theory of negligent entrustment. Kervin had received five speeding tickets in a two-year period before the accident, and had also been drinking that night.

The jury returned a verdict in favor of Kervin's father, but against the other defendants in the amount of $2.75 million in punitive damages. Judgment was entered in accordance with the verdict. The trial judge conducted an extensive post-trial evidentiary hearing and issued a "*Hammond* order"[1] setting forth the factors it used in determining that the verdict was not excessive.

The Statement of the Facts

The following facts are undisputed: 1) Clardy had a blood alcohol level of .21% at the time of the accident; 2) Clardy was racing his truck with the car driven by Kervin; 3) Clardy was driving approximately 80 mph; and

[1] See *Hammond v. City of Gadsden*, 493 So.2d 1374 (Ala. 1986).

4) Clardy was in Hoffman's lane when he struck her car head-on.

Other facts (taken from the evidence as viewed in a light most favorable to the plaintiff) are as follows: Clardy left his house at about 11:00 P.M. on the night of the accident. There is a dispute over where he was going, but there was testimony to the effect that he was going to check on some of his rental property. A "Clardy Realty" sign was in Clardy's truck at the time of the accident, and the accident occurred near some property owned by Clardy. As previously stated, all of the testimony, which included that of several eye-witnesses, showed that the accident was entirely the combined and concurring fault of Clardy and Kervin. The accident occurred between 1:00 and 1:30 A.M. on August 30, 1986.

On October 17, 1986, Mrs. Clardy incorporated her husband's business under the name Clardy Realty, Inc. She testified that she did so on the advice of her accountant and lawyer, and not in response to the litigation arising from the accident. According to Mrs. Clardy, the assets and liabilities of Clardy Realty were assumed by Clardy Realty, Inc. No consideration passed between the estate of Clardy and Clardy Realty, Inc. The location, manner of operation, and personnel of Clardy Realty remained the same following the incorporation. The only major change that occurred was Mrs. Clardy's becoming the licensed broker for the corporation, the position her husband had held in the proprietorship.

I. The Insufficiency-of-the-Evidence Issue

Under Clardy Realty, Inc.'s first allegation of error, it poses the following propositions: "A. Speculative evidence cannot support the verdict against Clardy Realty, Inc.; B. Theories of successor corporation liability are not applicable to impose liability on Clardy Realty, Inc.; and C. The trial court's erroneous charge to the jury concerning the presumption of agency by the owner of the vehicle con-

stitutes reversible error."[2] As a premise for its "insufficiency" argument, Clardy Realty, Inc., contends that the plaintiff failed to meet her burden of making a prima facie showing that Clardy was on business for the proprietorship at the time of the accident. This argument misperceives the relationship between Clardy as an individual, and Clardy as the sole proprietor of Clardy Realty. Whether Clardy, at the time of the accident, was on business for Clardy Realty is of no legal consequence as to the liability of either Clardy's estate or Clardy Realty, Inc., under the successor liability doctrine. Clardy the individual and Clardy Realty, a sole proprietorship, are but a single legal entity; and the two separate capacities (Clardy as an individual, and Clardy as a sole proprietor) can not be separated into two legal entities for the purpose of testing Clardy Realty, Inc.'s liability as a successor in interest to the liabilities of Clardy's estate.

II. The Successor Liability Issue

The failure of Clardy Realty, Inc.'s *respondeat superior* argument, however, does not answer the ultimate question concerning the application of the "successor corporation liability" theory. Under this prong of its argument, Clardy Realty, Inc., contends that it could not legally succeed to the debts and obligations of Clardy Realty, because the proprietorship ceased to exist upon Clardy's death and before Clardy Realty, Inc., came into existence; and, further, that the plaintiff did not seek to *substitute* Clardy Realty, Inc., for Clardy's estate, but sued Clardy Realty, Inc., as an *additional* defendant, thus impermissibly enhancing the plaintiff's award of punitive damages.

Clardy Realty, Inc.'s first contention is to the effect that there could be no continuity of operations due to the

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[2] Because the issue concerning the trial court's jury instruction on the presumption of agency was not preserved for review pursuant to Rule 51, A.R.Civ.P., we will not address this allegation of error.

break in time between Clardy's death and Clardy Realty, Inc.'s legal existence. This argument fails, both factually and legally. Factually, the time span between Clardy's death and Clardy Realty, Inc.'s incorporation was far too brief to allow any appreciable change in the business operations of the firm; and the evidence of record does not support a finding of any material change in the firm's operation. Legally, the test of the doctrine's application is not so tenuous or restrictive as to depend exclusively upon the "continuity of operations" element.

The requisite alternative elements of the "successor corporation liability" theory are stated in *Andrews v. John E. Smith's Sons Co.*, 369 So.2d 781 (Ala. 1979):

> "As a general rule, where one company sells or otherwise transfers all its assets to another company, the transferee is not liable for the debts and liabilities of the transferor unless (1) there is an express agreement to assume the obligations of the transferor, (2) the transaction amounts to a *de facto* merger or consolidation of the two companies, (3) the transaction is a fraudulent attempt to escape liability, or (4) the transferee corporation is a mere continuation of the transferor. 15 Fletcher, *Cyclopedia Corporations* § 7122 (Perm. ed. 1973); 19 Am. Jur. 2d § 1546."

369 So.2d at 785. Under appropriate instructions, and the facts disclosed of record, the jury was authorized to conclude that one or more of these elements was present, and, thus, that Clardy Realty, Inc., succeeded to the liabilities of Clardy Realty.

The second aspect of Clardy Realty, Inc.'s argument (the recovery against both the estate and Clardy Realty, Inc.) is more difficult of resolution, and, indeed, contains a ring of logic. Ordinarily, the application of the "successor liability doctrine" does not contemplate that both entities will be held liable for a single obligation arising from a single

culpable act or other legal obligation. To be sure, if the doctrine is held to apply, the successor entity is ordinarily fully chargeable with the liability, but not the predecessor entity.

The parties agree that this issue has not been directly addressed in the Alabama cases. Authorities from other jurisdictions have been cited by the parties and thus consulted by us in our effort to resolve this issue. See *Tift v. Forage King Industries, Inc.*, 108 Wis.2d 72, 322 N.W.2d 14 (1982); *Plaza Express Co. v. Middle State Motor Freight, Inc.*, 40 Ill.App.2d 117, 189 N.E.2d 382, n.4 (1963); *Jones v. Eppler*, 266 P.2d 451, n.9, 10 (Okla. 1953); and *Acorn Lumber Co. v. Friedlander Box Co.*, 240 Ill.App. 425 (1926). Specifically, we adopt the rationales and the holdings of the *Tift* and *Jones* decisions. The *Tift* court held:

> "It should be emphasized that the corporate rule that exempts a successor company from the liabilities of its predecessor when it has purchased the assets of the predecessor is subject to . . . four exceptions . . . .
>
> "Two of these exceptions, the first and the fourth, are unrelated to the problem at hand, for where there is an express or implied assumption of the selling corporation's liabilities—tort, contract, or both—the problem is obviated; and where the transaction is fraudulent, protection is afforded under the law of fraudulent conveyances. The other two 'exceptions' are, however, relevant to our discussion of the purposes and policies behind causes of action for tort. These exceptions are not really exceptions at all, for when applicable they swallow up the rule of nonliability.
>
> "The second exception is that there is liability when the transaction amounts to a consolidation or merger (*de facto* or otherwise) of the purchaser and seller corporations. The third 'exception' ex-

ists when the purchaser corporation is merely a continuation of the seller corporation. When viewed in the context of a tort caused by a defective product, these two 'exceptions' merely recite that, where either one is applicable, there is 'identity,' because in substance the successor business organization which the plaintiff sues is, despite organizational metamorphosis, the same [entity] which caused his injury.

"As [Fletcher, *Cyclopedia Corporations*, Vol. 15, sec. 7122, p. 188,] points out, the rule and its exceptions were designed initially to protect contract or quasi-contract creditors of a dissolved business organization and, hence, as a general group, all four exceptions are irrelevant to tort except as to the extent that the second and third exceptions are indicia of 'identity.' These exceptions are declaratory of tests to be applied to encourage 'piercing the corporate veil' and to look to the substance and effect of business transformations or reorganizations to determine whether the original organization continues to have life or identity in a subsequent and existing business organization.

"They can be viewed also as tests for 'privity' with the subsequent organization even if the dealings were only between the original business organization and the ultimate consumer or the party injured.

"Exceptions two and three to the corporate rule demonstrate that, when it is the same business organization that one is dealing with, whether it be by consolidation, merger, or continuation, liability may be enforced. These are tests of 'identity.' Suit is possible in these circumstances, because there would be privity with

the actual seller or manufacturer, *i.e.*, the exceptions are guidelines to determine under what circumstances the original entity continues to exist, albeit in an altered form.

"By applying these rules of corporate law, it is apparent, either by application of exception two or three that the present corporation is the same as the prior organization, *i.e.*, it has substantially the same identity although transformed by merger, consolidation, etc. Hence, an injured party who dealt with the predecessor organization could sue the successor. Where a defendant has retained the same identity, though perhaps not the same name or form of organization, the element of privity is satisfied.

"If there is business succession, then in effect the plaintiff is suing the 'same' business that [committed] the original [culpable conduct]. Under such a state of facts, a novel or unusual problem is not presented. A court merely need determine that the defendant, despite business transformations, is substantially the same as the original [entity]. This is the application of existing corporate law; and such law governs the decision in this case, because it is clear that there is identity between the original [entity] and the present [entity].

"It should be emphasized, however, that the possible fixing of liability on the [successor entity] does not necessarily exonerate the [predecessor entity]. The present organization may well have the right of indemnity. What is important, however, is that the plaintiff may seek recourse against either. Where the burden of payment eventually falls [as] between an existing organization . . . and [the present] organization that is

a continuation of the former ought not to be a concern of an injured plaintiff."

108 Wis.2d at 77-80, 322 N.W.2d at 16-17.

The *Jones* court wrote:

"It is urged that the judgment against the defendant, L. C. Jones Trucking Company, a corporation, is void for the reason that the corporation was not in existence at the time of plaintiff's injuries. The record discloses that the corporate defendant was organized and incorporated October 9, 1948; that the accident occurred on June 14, 1948; that the corporation took over the individual business and all the assets of L. C. Jones d/b/a L. C. Jones Trucking Co., without consideration other than corporate stock issued to the individuals, including the use of the franchises or motor carrier permits formerly issued to L. C. Jones, individually, and the defendant L. C. Jones Trucking Company, a corporation, operated under them, and by an added endorsement on its policy, the public liability insurance carrier became the insurance carrier of the successor corporation; that all the assets of the new corporation were derived from the old L. C. Jones Trucking Company and that the new corporation remained under the same management; that the corporate president and manager is L. C. Jones, former owner of the old L. C. Jones Trucking Company; that, in fact, the business was continued in the same manner as before the incorporation and the new corporation was merely a continuation of its predecessor. However, it is contended, by the defendants, that we are not dealing with the merger of corporations, but are concerned with a case wherein an individual was engaged in the trucking business; that later the

individual and others organized a corporation to conduct the same business; that under these circumstances the corporation does not become liable for an unliquidated tort arising before the corporation was organized. Citing Burkholder v. Okmulgee Coal Co., 82 Okl. 80, 196 P.2d 679 and other cases of similar import in support of this contention.

"We disagree. The mere fact that a corporation is organized to take over a business formerly conducted by a firm or individual is not of itself sufficient to render it liable for a debt incurred by such firm or individual in conducting such business. But where, as in the instant case, it appears that the property is simply transferred to the corporation without consideration other than corporate stock issued to the individuals and the business is but a continuation of the old and is conducted as before, under the same name and management, the corporation, so formed and operated, will be liable for the existing debts of the unincorporated entity, as it will be presumed that such debts were assumed. 13 Am.Jur., Corporations, Secs. 1248 and 1249. St. Clair Lime Co. v. Ada Lime Co., 196 Okl. 29, 162 P.2d 547; S. & J. Supply Co. v. Warren, 191 Okl. 683, 133 P.2d 201; Oklahoma Title Co. v. Burrus, 172 Okl. 94, 44 P.2d 852, 853, and cases cited therein; Fletcher on Corporations, Vol. 8, Sec. 4014; Thompson on Corporations, 4th Ed., Vol. 4, Sec. 2436 et seq.

"While we have passed upon the question of assumption of debts (see above cases) this is the first occasion for determining such corporation entity's liability for torts of its predecessor. A tort liability of an individual, partnership or corporation is an indebtedness which may be en-

> forced against a corporation which takes over the business and assets of its predecessor under the circumstances outlined above, as the assumption of the liabilities of a predecessor includes tort liabilities. 13 Am.Jur., Corporations, Sec. 1253; Barnes v. Liebig, 146 Fla. 219, 1 So.2d 247."

266 P.2d at 457-58.

Here, the facts, when tested against the rationales of *Tift* and *Jones*, defy any conclusion save one: that Clardy Realty, Inc., became the successor corporation to the interests and liabilities of Clardy Realty, a sole proprietorship.

III. The Damages Issue

A. Constitutional Grounds

The trial court entered the following supplementary order denying the defendants' post-judgment motions:

"ORDER

> "This court having previously conducted a 'Hammond' hearing on March 31, 1988, and having previously entered its ORDER denying the post-trial motion filed by Defendants Clardy Realty, Inc., and Debby D. Clardy, Executrix of the Estate of Thomas Eugene Clardy, now states for the record the factors considered in denying said Motion pursuant to *Hammond v. City of Gadsden*, 493 So.2d 1374 (Ala. 1986).
>
> "This court has considered the combined culpability of the Defendants, the desirability of discouraging others from similar conduct, the impact of the judgment on the parties and innocent third persons, and has also considered the necessity of preventing unnecessary homicides, especially in cases where the facts and circumstances are similar to those that took the life of Norma Hoffmann and Thomas Eugene Clardy.

"Even though the award of 2.75 million dollars for the Plaintiff is a large sum of money, it is not excessive as a matter of law. The Alabama Supreme Court has recently upheld an award of 3.5 million dollars in a wrongful death action where the combined culpability of the defendants appears to have been less than in the instant case. *Blackbelt Wood Co. v. Sessions*, 514 So.2d 1249 (Ala. 1986).

"The jury's verdict is clothed with constitutional protection, as set forth in Article I, Section 11, *Constitution of 1901*. Unless the verdict is flawed, thereby losing its constitutional protection, this court has no authority to interfere with the jury's verdict. There was no evidence that the verdict in this case was based on bias, passion, prejudice, corruption or other improper motive. The jury was composed of male and female, black and white, young and elderly. The jurors acted responsibly and conscientiously throughout a well-tried case. This court had the opportunity to observe the parties, their counsel, a significant number of witnesses, and a substantial number of documents, including photographs, maps, and a [video tape] of the scene. The court also had the opportunity to observe the reaction of the jurors to the evidence and to the court's instructions. The jury's verdict for 2.75 million dollars was consistent with the evidence and the court's instructions, and, after due consideration, the motion of the Defendants was previously DENIED the 11th day of May, 1988.

"Dated this the 13th day of May, 1988.

"/s/ _____
"JAMES T. GULLAGE
"Circuit Court"

After reviewing the trial court's *Hammond* order and the arguments of counsel, we find no constitutional basis for reversal. See *Industrial Chemical & Fiberglass Corp. v. Chandler*, [Ms. 86-381, -385, June 23, 1989] ___ So.2d ___ (Ala. 1989) (on rehearing); and *Central Alabama Electric Cooperative v. Tapley*, [Ms. 87-1188, May 12, 1989] ___ So.2d ___ (Ala. 1989).

B. Non-Constitutional Grounds

We have carefully reviewed the entire record and considered the gravity of the wrong in light of the trial judge's post-judgment findings and conclusions, as well as other judgments affirmed by this Court in wrongful death cases, and we find no basis for reversal on non-constitutional grounds. See *Alabama Power Co. v. Capps*, 519 So.2d 1328 (Ala. 1988), appeal dismissed, ___ U.S. ___, 108 S.Ct. 1723 (1988); *Black Belt Wood Co. v. Sessions*, 514 So.2d 1249 (Ala. 1986); *Alabama Power Co. v. Cantrell*, 507 So.2d 1295 (Ala. 1986), appeal dismissed, ___ U.S. ___, 108 S.Ct. 2008 (1988); *General Motors Corp. v. Edwards*, 482 So.2d 1176 (Ala. 1985); *American Pioneer Life Ins. Co. v. Sandlin*, 470 So.2d 657 (Ala. 1985); and *National Security Fire & Casualty Co. v. Bowen*, 447 So.2d 133 (Ala. 1983).

AFFIRMED.

Almon, Shores, and Adams, JJ., concur.

Maddox, J., concurs as to parts II and III, and concurs in the result as to part I.

Houston, J., concurs as to part I, and concurs in the result as to parts II and III.

APPENDIX B

87-1070 - *Clardy v. Sanders*

On Application for Rehearing

JONES, JUSTICE.

APPLICATION OVERRULED.

Almon, Shores, and Adams, JJ., concur.

Maddox, and Houston, JJ., concur specially.

MADDOX, JUSTICE (Concurring specially).

I agree that the defendants' application for rehearing should be overruled. I am writing specially to point out that punitive damages in a wrongful death case, such as the case here, are different in nature from punitive damages in any other type of tort action in Alabama. The defendants' constitutional arguments concerning this punitive damages award must be considered in a different light than constitutional challenges to punitive damages awards in other tort actions, because in Alabama, only punitive damages are recoverable in a wrongful death action. See my opinion concurring in part and dissenting in part in *Alabama Power Co. v. Cantrell*, 507 So. 2d 1295, 1306 (Ala. 1986), appeal dismissed, ___ U.S. ___, 108 S.Ct. 2008 (1988).

Houston, J., concurs.

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SUPREME COURT OF ALABAMA

APPENDIX C

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

CIVIL ACTION NUMBER: CV-87-448

MARTHA HOFFMANN SANDERS,
Mother of NORMA DAVISON HOFFMANN,
deceased minor,

Plaintiff,

vs.

DEBBY D. CLARDY,
in her representative capacity as Executrix of the Estate of Thomas Eugene Clardy; James C. Kervin; John H. Kervin and Clardy Realty, Inc.

Defendants.

ORDER

This Court having previously conducted a "Hammond" hearing on March 31, 1988 and having previously entered its ORDER denying the post-trial Motion filed by Defendants Clardy Realty, Inc. and Debby D. Clardy, Executrix of the Estate of Thomas Eugene Clardy, now states for the record the factors considered in denying said Motion pursuant to *Hammond vs. City of Gadsden*, 493 So.2d 1374 (Ala. 1986).

This Court has considered the combined culpability of the Defendants, the desirability of discouraging others from similar conduct, the impact of the judgment on the parties and innocent third persons and has also considered the necessity of preventing unnecessary homocides, especially in cases where the facts and circumstances are similar to

those that took the life of Norma Hoffmann and Thomas Eugene Clardy.

Even though the award of 2.75 million dollars for the Plaintiff is a large sum of money, it is not excessive as a matter of law. The Alabama Supreme Court has recently upheld an award of 3.5 million dollars in a wrongful death action where the combined culpability of the defendants appears to have been less than in the instant case. *Blackbelt Wood Company v. Sessions*, 514 So.2d 1249 (Ala. 1986).

The jury's verdict is clothed with constitutional protection, as set forth in Article I, Section 11, *Constitution of 1901*. Unless the verdict is flawed, thereby losing its constitutional protection, this Court has no authority to interfere with the jury's verdict. There was no evidence that the verdict in this case was based on bias, passion, prejudice, corruption or other improper motive. The jury was composed of male and female, white and black, young and elderly. The jurors acted responsibly and conscientiously throughout a well tried case. This Court had the opportunity to observe the parties, their counsel, a significant number of witnesses, and a substantial number of documents, including photographs, maps, and a video film of the accident scene. The Court also had the opportunity to observe the reaction of the jurors to the evidence and to the Court's instructions. The jury's verdict for 2.75 million dollars was consistent with the evidence and the Court's instructions, and, after due consideration, the Motion of the Defendants was previously DENIED the 11th day of May, 1988.

DATED this the 13 day of May, 1988.

/s/ James T. Gullage
JAMES T. GULLAGE
Circuit Judge

APPENDIX D

THE STATE OF ALABAMA - - JUDICIAL DEPARTMENT
THE SUPREME COURT OF ALABAMA
OCTOBER TERM, 1988-89

86-381

Industrial Chemical and Fiberglass Corporation

v.

Lynn B. Chandler, et al.

86-385

Industrial Chemical and Fiberglass Corporation

v.

Peggy Ann Ensley, et al.

Appeals from Jefferson Circuit Court

On Application for Rehearing
and Application for Stay

ADAMS, JUSTICE.

Industrial Chemical and Fiberglass Corporation, a distributor of fiberglass products and supplies, appealed from judgments based upon a jury verdict awarding Lynn B. Chandler and Peggy Ann Ensley $2.5 million each on their claims against Industrial Chemical after their husbands, Terry D. Chandler and Dewey E. Ensley, Jr., were killed by a chemical fire that swept through a cylindrical fiberglass tank in which the men were working.

In our first opinion in this case (September 30, 1989), we held that the punitive damages award against Industrial Chemical did not violate its rights under the Eighth Amendment to the United States Constitution and that Lynn Chandler and Peggy Ann Ensley had capacity to assert claims for Industrial Chemical's breach of implied warranty. Our second opinion (January 16, 1989), after remand for an order required by *Hammond v. City of Gadsden*, 493 So. 2d 1374 (Ala. 1986), held that the record did not establish that the awards were excessive as a matter of law, that it was not established or reflected in the record that the verdicts were based upon bias, passion, corruption or other improper motive, and that the compensatory damages awarded for pain and suffering were not excessive.

On rehearing, Industrial Chemical argues (1) that we should stay our decision pending the United States Supreme Court's decision reviewing *Kelco Disposal, Inc. v. Browning-Ferris Indus.*, 845 F.2d 404 (2d Cir.), *cert. granted*, ___ U.S. ___, 109 S.Ct. 527 (1988), argued en banc, April 18, 1989; (2) that our decision contradicts our traditional interpretation of the wrongful death act; (3) that we should reconsider our determination that the punitive damages awarded in these cases are not sufficiently analogous to criminal punishments to warrant application of the Eighth Amendment; and (4) that we failed to address its argument that the lack of standards for judges and juries to follow in imposing punitive damages under Alabama's wrongful death statute violated its rights under the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

I

Industrial Chemical argues that by granting a stay of the judgments in these cases, "the Court would relieve Industrial Chemical of the unnecessary burden of petition-

ing the Supreme Court for a writ of certiorari on the Eighth Amendment issue" and "similarly, by granting a stay, this Court would relieve the plaintiffs of the unnecessary burden of having to file with the Supreme Court a brief in opposition to the petition." Thus, Industrial Chemical submits that this Court could "save valuable judicial time and resources" by granting a stay pending the Supreme Court's decision in *Kelco Disposal, Inc. v. Browning-Ferris Indus.*, supra. Our holdings were based, however, on a thorough review of applicable case law and the application in *Ingraham v. Wright*, 430 U.S. 651 (1977), and *Electro Services, Inc. v. Exide Corp.*, 847 F.2d 1524 (11th Cir. 1988), to the facts before us. *Ingraham* and *Electro Services* remain precedent, and, consequently, Industrial Chemical's convenience notwithstanding, we refuse to stay the judgments.[1]

II

Industrial Chemical submits that our decision contradicts our traditional interpretation of the wrongful death act, and that we should reconsider our holding that the punitive damages awarded in these cases are not sufficiently analogous to criminal punishments to warrant application of the Eighth Amendment. These arguments were, however, addressed in full in our first opinion, and Industrial Chemical raises no controlling matter of law or fact that was overlooked or not disposed of in that opinion. Consequently, we decline to reconsider our holdings that punitive damages awarded in a civil proceeding are not subject to the constitutional restrictions of the Eighth Amendment, and that the wrongful death act is not penal in effect and is not of that class of cases sufficiently analogous to criminal punishments in which they are administered to justify application of the Eighth Amendment.

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[1] We note that the writ of certiorari was granted in *Kelco Disposal* on December 5, 1988, more than two months after our first opinion was released.

III

The final issue for review on rehearing is Industrial Chemical's assertion that we failed in our opinion to address its argument that the lack of standards for judges and juries to follow in imposing punitive damages under Alabama's wrongful death act violates its rights under the Due Process Clause of the Fourteenth Amendment.

> "As the Supreme Court has repeatedly made clear, the content of due process is not limited to the specific provisions of the Bill of Rights. Nor is due process confined to criminal prosecutions; it applies to any legal proceeding or regimen by which any person may be deprived of 'life, liberty, or property.' Due process requires, in whatever context, that legal procedures be consistent with 'fundamental fairness'; that they be consonant with 'ordinary notions of fair play and the settled rules of law'; that they accord with 'traditional notions of fair play and substantial justice'; and that they not offend 'the community's sense of fair play and decency.' However phrased, the message is clear: due process mandates at all times, in all circumstances, and for all defendants, 'fundamental fairness' at the hands of the law."

J. Jeffries, *A Comment on the Constitutionality of Punitive Damages*, 72 Va. L. Rev. 139, 151-52 (1986). (Citations omitted.) The command of due process in the context of punitive damages requires, however, a balance between the due process rights of both the plaintiff and the defendant.

A

Our cases have long held that evidence of the defendant's wealth, or lack of wealth, is highly prejudicial and, therefore, inadmissible (and our cases recognize no distinction

between situations involving compensatory damages and those involving punitive damages):

> "In *Ware (v. Cartledge*, 24 Ala. 622, 60 Am.Dec. 489 (1854)), the plaintiff was permitted to prove, over objection, that the defendant possessed property valued at $20,000. Reversing the trial court, this court said that if wealth of a defendant is permitted then common justice requires a converse rule to prevail in the case of poor defendants. Justice Ligon wrote that common sense revolts at the adoption of such a rule. 'For sad would be the fate of that country, whose laws conceded to the insolvent bully, seducer, or slanderer, the privilege of perpetrating his wrongs with comparative impunity, under assurance that, when sued for his practices, the damages would be graduated to his present ability to pay them, and consequently would be merely nominal. No sound principle of law tolerates such a practice.' (Citing cases.) Not only have our cases held that the wealth of a defendant is not admissible, but [they] also have held inadmissible the poverty of a plaintiff. In *Pool* [*v. Davers*, 30 Ala. 672 (1857),] this court said that a plaintiff's being poor is not a legitimate matter for the consideration of the jury in any point of view.
>
> "While we recognize that other jurisdictions do permit the introduction into evidence [of] the wealth of a defendant, we adhere to our rule of excluding evidence of wealth of the defendant. Even though the rule was announced by this court in 1854, we opine that it is sound today—and for the same reason. *Liability for damages cannot be determined by the economic condition of either party.* Cf. *Allison v. Acton-Etheridge Coal Co., Inc.*, 289 Ala. 443, 268 So. 2d 725 (1972)."

Southern Life & Health Ins. Co. v. Whitman, 358 So. 2d 1025, 1026-27 (Ala. 1978). (Emphasis added.) Consequently, evidence of financial worth cannot be introduced during the factfinding process to temper or mitigate a jury's potential award without impugning the process itself. Further, finding such evidence prejudicial and, therefore, inadmissible does not work a deprivation of the constitutional guaranty of due process: subject to the limitation that a party may not be precluded from presenting facts supporting his theory of the case, a rule of evidence constitutes due process of law if it is reasonable and affords an opportunity for defense. *Crowell v. Benson*, 285 U.S. 22 (1932).

Dean Gamble notes that "the Alabama approach with respect to the admissibility of evidence concerning the relative wealth of the defendant is a departure from that used in other jurisdictions." C. Gamble, *Alabama Law of Damages*, § 37-9, at 491, n. 7 (2d ed. 1988). For example, in Florida, evidence of financial worth is admissible where punitive damages are allowable: "The purpose of the rule of evidence is to indicate to the jury [in] what amount, if any, a verdict would be proper to assess for punishment and at the same time not render the defendant bankrupt." *Tallahassee Democrat, Inc. v. Pogue*, 280 So. 2d 512 (Fla. Dist. Ct. App. 1973). Additionally, "A hundred dollar punitive liability may be sufficient punishment for a man of limited means; a hundred thousand dollar punitive liability might be inadequate for a man of great wealth. For these reasons, courts permit the plaintiff claiming punitive damages to introduce evidence showing something of the defendant's financial resources. . . ." D. Dobbs, *Handbook on the Law of Remedies*, § 39, at 218-19 (1973).

Nevertheless, policy considerations are paramount in our continued adherence to that rule of evidence first announced in *Ware v. Cartledge*, 24 Ala. 622, 60 Am. Dec. 489 (1854). For instance, a plaintiff could show himself to be poor and the defendant to be of great wealth; the

sympathies of the jury would possibly be aroused, and the punitive award would reflect the economic conditions of the parties and not the liability. Conversely, a defendant could show himself to be poor and the plaintiff to be of great wealth, and concessions would be made to the "insolvent bully . . . [and] damages would be graduated to his present ability to pay them, and consequently would be merely nominal." *Ware v. Cartledge*, 24 Ala. at 626. Accordingly, we reaffirm our substantive rule of law that liability for damages cannot be determined by the economic condition of either party, and, therefore, we hold that "fundamental fairness" in the context of punitive damages does not require considerations of a wealth-based standard for their award prior to determining liability.

Further, the awarding of punitive damages is discretionary with the jury (*Roberson v. Ammons*, 477 So. 2d 957 (Ala. 1985); *Tallant v. Grain Mart, Inc.*, 432 So. 2d 1251 (Ala. 1983); *Deaton, Inc. v. Burroughs*, 456 So. 2d 771 (Ala. 1984); *Morgan v. South Central Bell Tel. Co.*, 466 So. 2d 107 (Ala. 1983); *Shiloh Const. Co. v. Mercury Const. Corp.*, 392 So. 2d 809 (Ala. 1980); and *Crum v. McGhee*, 289 Ala. 244, 266 So. 2d 855 (1972)), when there is a willful and malicious wrong, except for negligence in wrongful death cases:

> "To authorize 'punitive,' 'exemplary,' or 'vindictive' damages, there must be '. . . negligence,' meaning such an entire want of care as to raise the presumption that the person at fault is conscious of the probable consequences of his carelessness and indifferent to the danger of injury to the person or property of others. Punitive damages are allowable for a wrong maliciously perpetrated, or where the wrongful act is done knowingly, wantonly, and recklessly, under such circumstances as to indicate that the wrongdoer knew that the act would probably injury persons or property, or where the act was so grossly

> negligent, oppressive, or fraudulent as to amount to malice."

C. Gamble, *Alabama Law of Damages*, § 4-1 (2d ed. 1988). (Citations omitted.)

If the existence of malice, wantonness, or negligence is supported as fact by evidence in the record, "we must see no offense to the Constitution, and no deprivation of any constitutional right of [the defendant] in committing the assessment of such damages, including the amount to be allowed, to the sound discretion of the jury." *Toole v. Richardson-Merrell, Inc.*, 251 Cal. App. 2d 689, 60 Cal. Rptr. 398 (1967). Malice, wantonness, and negligence cannot be found in a vacuum, and in the event that their existence as fact is not supported by evidence in the record, the defendant may remove the case or the issue from the trier of fact; see Rule 56, A.R.Civ.P., summary judgment (no genuine issue of material fact), and Rule 50 A.R.Civ.P., directed verdict and judgment notwithstanding the verdict (complete absence of proof on an issue material to the claim).[2]

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[2] To limit the jury's discretion other than by proper instruction as to the circumstances under which punitive damages are awarded, would appear to violate the right of trial by jury guaranteed by Article I, § 11, of the Alabama Constitution of 1901 ("That the right of a trial by jury shall remain inviolate"):

> "The following propositions of law, each of which is involved in this case, are deemed to be either axiomatic or undeniable:
>
> ". . . .
>
> "(7) To except these individual and inalienable rights of the people out of the general powers of government is to prohibit the Legislature, the executive, or the judicial branch, one or all, from destroying or impairing such reserved rights of the people.
>
> "(8) To provide that such reserved rights shall forever remain inviolate is to forbid the sovereign through the leg-

Therefore, "fundamental fairness" at the hands of the law does not extend to the defendant the right to impugn the factfinding process by introducing evidence of financial condition or solvency, or by limiting the jury's discretion to award punitive damages other than by proper jury instruction, at the expense of the plaintiff's right to "fundamental fairness." Consequently, standards for judges and juries to follow in imposing punitive damages under Alabama's wrongful death act to meet the command of due process must exist in post-judgment review of the jury's verdict.

B

Although not imposing the stigma of crime or the unique burdens of imprisonment, punitive damages nonetheless serve to place the defendant on notice that it has engaged in conduct considered intolerable by society and also serves to deter others from following the defendant's example. But in levying a punitive award, the degree or amount must be comparable to the act deserving punishment. And though the defendant has engaged in intolerable conduct, it does not surrender its right to "fair" punishment; in other words, "although punitive damages need bear no particular relationship to actual damages, they, nonethe-

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islature, executive, or judicial department, one or all, from ever burdening, disturbing, qualifying, or tampering with, these rights, to the prejudice of the people."

Alford v. State, 170 Ala. 178, 54 So. 213 (1910).

See Alabama Pattern Jury Instructions 11.01 (punitive damages may be awarded "where the plaintiff reasonably satisfies the jury from the evidence that plaintiff has been (willfully or) wantonly injured or damaged by the defendant"); 11.03 (the jury must take into consideration "the character and degree of the wrong as shown by the evidence in the case, and the necessity of preventing similar wrongs"); and 11.18 (the jury's verdict "should be directly related to the culpability of the defendant(s) and necessity of preventing similar wrongs in the future"). *Alabama Pattern Jury Instructions—Civil* (1974).

less, must not exceed an amount that will accomplish society's goals of punishment and deterrence." *Green Oil Co. v. Hornsby*, 539 So. 2d 218 (Ala. 1989), citing *Maryland Casualty Co. v. Tiffin*, 537 So. 2d 469 (Ala. 1988), *City Bank of Alabama v. Eskridge*, 521 So. 2d 931 (Ala. 1988), and *Roberson v. Ammons*, 477 So. 2d 957 (Ala. 1985). Hence, we must ask, after the return of a jury award of punitive damages, what process is due the defendant to insure that he has been provided "fundamental fairness" at the hands of the law and to insure that society's goals of punishment and deterrence have been accomplished?

> "If a defendant is dissatisfied with a jury's verdict, and feels that it is excessive, or otherwise flawed, he is entitled to the protection of a variety of safeguards. The defendant may move for remittitur and a new trial in the trial court, and may appeal as a matter of right from the denial of either. He is entitled to a *de novo* review of the jury's verdict on appeal [Code 1975, § 12-22-71]. The appellate courts in this state have the authority to order a new trial due to the excessiveness of the verdict, to conditionally order a new trial unless the plaintiff accepts a remittitur [*United Services Auto. Ass'n v. Wade*, [Ms. 86-1151, Mar. 17, 1989) ___ So. 2d ___ (Ala. 1989)], and to order the trial court to conditionally order a new trial unless the plaintiff accepts a remittitur [*Gulf Atl. Life Ins. Co. v. Barnes*, 405 So. 2d 916 (Ala. 1981)].
>
> "If a defendant properly moves the trial court to do so, the trial court is obligated to state on the record its reasons for either interfering with the jury's verdict or not interfering with it [*Hammond v. City of Gadsden*, 493 So. 2d 1374 (Ala. 1986)]. And, in making the determination of whether the verdict is excessive (or inadequate),

a trial court is authorized to consider the following non-exclusive list of factors:

" ' "(1) Punitive damages should bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that actually has occurred. If the actual or likely harm is slight, the damages should be relatively small. If grievous, the damages should be much greater.

" ' "(2) The degree of reprehensibility of the defendant's conduct should be considered. The duration of this conduct, the degree of the defendant's awareness of any hazard which his conduct has caused or is likely to cause, and any concealment or 'cover-up' of that hazard, and the existence and frequency of similar past conduct should all be relevant in determining this degree of reprehensibility.

" ' "(3) If the wrongful conduct was profitable to the defendant, the punitive damages should remove the profit and should be in excess of the profit, so that the defendant recognizes a loss.

" ' "(4) The financial position of the defendant would be relevant.

" ' "(5) All the costs of litigation should be included, so as to encourage plaintiffs to bring wrongdoers to trial.

" ' "(6) If criminal sanctions have been imposed on the defendant for his conduct, this should be taken into account in mitigation of the punitive damages award.

" ' "(7) If there have been other civil actions against the same defendant, based on the same

> conduct, this should be taken into account in mitigation of the punitive damages award." ' "

Central Alabama Electric Cooperative v. Tapley, [Ms. 87-1188, May 12, 1989] ___ So. 2d (Ala. 1989), quoting from *Green Oil Co. v. Hornsby*, 539 So. 2d at 223-24 (quoting in turn *Aetna Life Ins. Co. v. Lavoie*, 505 So. 2d 1050, 1062 (Ala. 1987) (Houston, J., concurring)).

From these considerations (and from those reaffirmed in *Hammond v. City of Gadsden*, 493 So. 2d 1379 (Ala. 1986), emerge two related protections: First, a requirement of "reasonableness, of proportionality, of sensible relation between punishment and offense," and, second, a guarantee of "not just bare survival, but continued productive economic viability." C. Jeffries, *A Comment on the Constitutionality of Punitive Damages*, supra, at 156 (discussing Magna Charta's intent to curb unlimited punitive authority). Nothing prevents the defendant, at a hearing on a motion for new trial based on an allegedly flawed jury verdict,[3] from presenting evidence to prove one or more of the above considerations, and, by doing so, to guarantee that his right to due process of law in regard to the jury's award is protected. In sum, "fundamental

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[3] "[A] jury verdict may not be set aside unless the verdict is flawed, thereby losing its constitutional protection. It is only in those cases that a trial court, pursuant to A.R.Civ.P. 59(f), and this Court, pursuant to Code 1975, § 12-22-71, may interfere with a jury verdict. Insofar as damages are concerned, a jury verdict may be flawed in two ways. First, it may include or exclude a sum which is clearly recoverable or not as a matter of law, or which is totally unsupported by the evidence, where there is an exact standard or rule of law that makes the damages legally and mathematically ascertainable at a precise figure. . . . Second, a jury verdict may be flawed because it results, not from the evidence and applicable law, but from bias, passion, prejudice, corruption, or other improper motive." *Hammond v. City of Gadsden*, 493 So. 2d at 1379.

fairness" requires that the defendant be given the opportunity to present proof to the trial court during post-judgment review of the verdict that the punitive award is unreasonable, disproportionate, or economically destructive (the plaintiff, of course, is entitled to offer proof contradicting the defendant's, or, conversely, to offer proof that the award is inadequate).

Subsequently, the trial court will state for the record the factors considered in either granting or denying a motion for new trial based upon the alleged excessiveness or inadequacy of the jury's verdict, as required by *Hammond v. City of Gadsden*, supra. The defendant may appeal, as a matter of right, from the denial of his motion for new trial, and he is entitled to a review of the verdict on appeal, where he once again may present proof as to the excessiveness of the award. See Ala. Code 1975, § 12-22-71. We emphasize, as we did in *Hammond v. City of Gadsden*, that no substantive rule of law is changed by this procedure; and "[w]e make no attempt to enumerate all of the factors which may be considered by the trial court," leaving that to its sound discretion. *Hammond v. City of Gadsden*, 493 So. 2d at 1379. We do, however, reaffirm the substantive rules of law, stated in our earlier opinion in this case, "that a trial court may not conditionally reduce a jury verdict merely because it believes the verdict overcompensates the plaintiff; that a trial court may not substitute its judgment for that of the jury; *and that there can be no ironclad rule in considering the adequacy or excessiveness of a verdict. Each case must be determined by its own facts and on its own merits.*" *Industrial Chemical & Fiberglass Corp. v. Chandler*, [Ms. 86-381, -385, January 16, 1989] ___ So. 2d at ___ (Ala. 1989), citing *Hammond v. City of Gadsden*, supra. (Emphasis added.)

We noted in our second opinion in this case that Industrial Chemical did not provide either the trial court (on post-judgment review) or this Court with financial data evidencing and supporting its statement that it would face

imminent financial destruction if the awards were allowed to stand. Further, we determined that Industrial Chemical's culpability, after a thorough review of the record, was accurately reflected by the verdicts, and that the verdicts were appropriate and desirable for discouraging similar conduct by others in the future. On rehearing, Industrial Chemical submits no argument on any of the mitigating factors listed above, and we decline to grant the application for rehearing to give it the opportunity to do so.[4] Industrial Chemical received the process due to guarantee "fundamental fairness" in the jury's verdicts, and, consequently, we find no violation of the Fourteenth Amendment as applied to the imposition of punitive damages under the wrongful death act.

OPINION EXTENDED; APPLICATIONS DENIED.

Jones, Almon, Shores, and Steagall, JJ., concur.

Maddox, and Houston, JJ., concur in part and dissent in part.

Industrial Chemical v. Chandler

MADDOX, JUSTICE (Concurring in part and dissenting in part).

For my views on this case, see my concurring in part and dissenting in part opinion filed January 20, 1989, ___ So. 2d ___ (Ala. 1989).

Additionally, I would stay the execution of this judgment, however, pending a decision of the Supreme Court of the United States in its review of *Browning-Ferris In-*

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[4] Industrial Chemical chose not to submit adequate argument on this issue in its first brief as appellant, in its reply brief, its post-remand brief, or its brief in support of its application for rehearing. Industrial Chemical has been given every opportunity to "address this pressing issue," and it has not done so. We decline to allow it a fifth opportunity to do so.

dus. of Vermont, Inc. v. Kelco Disposal, Inc., 845 F.2d 404 (2nd Cir. 1988), cert. granted, ___ U.S. ___ ,109 S.Ct. 527 (No. 88-556, Dec. 5, 1988).

Houston, J., concurs.

APPENDIX E

THE STATE OF ALABAMA - - JUDICIAL DEPARTMENT
THE SUPREME COURT OF ALABAMA
OCTOBER TERM, 1988-89

87-1188

Central Alabama Electric Cooperative

v.

Janice C. Tapley

Appeal from Tallapoosa Circuit Court
(CV-87-07)

PER CURIAM.

Central Alabama Electric Cooperative ("CAEC"), a cooperative non-profit membership corporation, appeals from a judgment against it on a general jury verdict in a wrongful death case. Janice C. Tapley sued as a result of the electrocution of her husband, Wendall M. Tapley. This action was brought pursuant to Alabama Code 1975, § 25-5-11(a), which gives to dependents of an employee, killed under circumstances that might create liability on the part of a third party, the right to commence an action against that third party. CAEC filed motions for a directed verdict on the issues of negligence, wantonness, and Tapley's contributory negligence. The trial court denied these motions, and the case was submitted to the jury. After the jury returned a verdict in the amount of $1 million, CAEC filed a motion for a judgment notwithstanding the verdict on the issues of negligence, wantonness, and Tapley's contributory negligence. This motion, too, was denied.

Tapley, a truck driver employed by Diversified Support Services to haul asphalt and related materials to and from an asphalt plant, was killed when he raised the "trailer dump" of his tractor-trailer rig into an uninsulated electric distribution line ("line") owned by CAEC. Tapley was called to work, unexpectedly, around 6:00 o'clock on the morning of his death. Around 7:45 A.M. that morning, Tapley was attempting to clean water, dirt, and other debris from his trailer dump prior to taking on a load of asphalt. He positioned the rig underneath the line, raised the trailer dump into the line, and, while standing on the wet, muddy ground beside the truck, apparently reached back into the cab and contacted the dump control switch, apparently attempting to raise or lower the trailer dump.

The line with which Tapley's trailer dump came in contact had been erected by CAEC within a week of Tapley's death, pursuant to a request by Pee Wee Ingram, one of the owners of the asphalt plant. Hampton Holman, CAEC's district manager, and Lewis Reynolds, CAEC's lead lineman, met with Ingram prior to construction of the line to discuss the type of electrical service needed and the location of the line necessary to provide that service. The CAEC representatives saw trailer dumps similar to the one operated by Tapley, as well as other equipment, at the asphalt site. CAEC looked at several alternative routes by which to string the line to supply electrical power so that the line could go to a switchbox already in place next to the asphalt plant, as Ingram had requested. While discussing the possibility of stringing the line across the areas of stockpiling (which areas required the use of trailer dumps in an upright position), Ingram stepped off the length of a trailer dump and told CAEC's representatives that the trailer, including the height of the bed and tarpaulin rack, would be between 35 and 36 feet, if it could have been raised absolutely perpendicularly. Using this information, CAEC determined that it could not string the line across areas of stockpiling, where dumping was ob-

viously taking place. Ingram agreed with this and with CAEC's determination to string the line across the roadway to the asphalt plant.

There was no designated area for drivers to clean out their trailer dumps prior to taking on a load of asphalt. Viewing the evidence most favorably to Tapley, we find that the area where Tapley was attempting to clean out his trailer dump at the time of his death was the firmest or hardest, and, thus, safest area. There was also other evidence that showed that there were several other areas away from the line, with no overhead obstructions, where Tapley could have cleaned out his trailer dump—for example, the roadway, from the entrance gate toward an incline, along which trailers were parked from time to time; a large area on a hill, where trailers were placed from time to time; and another area where trailers were parked in which crushed rock had been placed.

The roadway on which the accident occurred runs east to west, between a quarry operation on the south side and the asphalt operation on the north side. Over CAEC's objection, the trial court allowed evidence that eight to nine years earlier, for a different company, CAEC had placed three orange markers or balls on a separate power line that runs parallel to the left of the roadway in the quarry area. There were no other orange balls or any warning devices placed anywhere else in the area, and there were other electric lines that crossed the roadway into the plant on which no orange balls were placed. It is undisputed that CAEC was told by Ingram, prior to the erection of the line involved in this action, that there would be no stockpiling or placing of anything else on the ground in the area chosen for service. In addition, and again over CAEC's objection, the trial court allowed evidence of CAEC's placement of orange balls and ribbons, subsequent to the accident, upon the line that Tapley contacted, as well as Holman's testimony that he had intended to place an orange ball over the roadway (even though Ingram had

told him there would be no dumping), but that he did not have any in stock. Reynolds testified that at the time he constructed the line "he didn't see any reason to put a ball there," because he was told that there would not be unloading or dumping along this roadway.

It is undisputed that the height of the line was 6 1/2 to 8 feet above the National Electrical Safety Code ("NESC") minimum requirement. However, Tapley's expert testified that the height of the line was in violation of the NESC, because the "given local conditions were not considered," and, he said, "local conditions" means that "you should take into consideration everything that's possible to take into consideration to preserve the safety of the lines."

With that brief factual background, we proceed to consider all seven issues raised by CAEC. We, of course, will develop the facts more fully as the resolution of each issue requires.

I.

The first issue CAEC raises is the constitutional validity of Code 1975, § 6-5-410, the Alabama wrongful death statute, under the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States.[1] The primary attack pressed by CAEC is that, under Alabama's unique wrongful death statute, it is fundamentally unfair 1) for juries to award punitive damages for, in some cases, including this one, simple negligence (or misconduct less than intentional misconduct), and 2) to permit juries to assess punitive damages without standards to guide the determination of an appropriate amount.

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[1] The Attorney General was notified by this Court that this issue was pending and, after reviewing the briefs of counsel, the Attorney General declined to submit a brief. See A. R. App. P.

A. Fourth, Fifth, and Sixth Amendments

We will not analyze the appellant's contention that § 6-5-410, or an award of punitive damages generally, implicates the Fourth, Fifth, and Sixth Amendments, for it has not identified what specific rights it feels have been violated. Moreover, CAEC has made no specific arguments under either amendment, and this Court will not speculate or search for a particular basis for a constitutional challenge. See A. R. App. P. 28(a)(5); see also *Henderson v. Alabama A & M Univ.*, 483 So. 2d 392 (Ala. 1986). To the extent that CAEC alleges a violation of its rights to due process of the law, we address that argument under our treatment of the Fourteenth Amendment, *infra*. Any other Fourth, Fifth, or Sixth Amendment issue is waived under state procedural law, because CAEC has neither specifically argued nor specifically identified any other particular right.

B. Eighth Amendment

CAEC next maintains that the fact that our wrongful death statute mandates punitive damages requires us to analyze the "excessive fines" clause of the Eighth Amendment. A majority of this Court squarely rejected that very argument in *Industrial Chem. & Fiberglass Corp. v. Chandler*, [Ms. 86-381, Sept. 30, 1988, *on return to remand*, Jan. 20, 1989] ___ So. 2d ___ (Ala. 1989). In *Industrial Chemical*, we relied heavily on *Ingraham v. Wright*, 430 U.S. 651 (1977). As the Court in *Ingraham* noted, the provisions of the Eighth Amendment may apply to punishments that, although not strictly criminal, are quasi-criminal in nature. *Ingraham*, 430 U.S. at 669 n. 37. We refuse to reason, however, that, because the "excessive fines" clause may apply to quasi-criminal sanctions, such sanctions include those that involve allegedly excessive civil jury verdicts. Such circular reasoning would make little sense and bad law. Consequently, on the authority of *In-*

dustrial Chemical, we reject the argument that the judgment in this case implicates the Eighth Amendment.

C. Fourteenth Amendment

CAEC's final constitutional argument is that it has been denied its rights to procedural and substantive due process under the Fourteenth Amendment by the judgment below.

1. Procedural due process

We find that the procedural due process issue has not been adequately preserved for our review, due to noncompliance with fundamental concepts of issue preservation under state law. As we stated in *Bevill v. Owen*, 364 So. 2d 1201, 1203 (Ala. 1979):

> "It is a fundamental rule of appellate procedure that, regardless of [the] merits of [an] appellant's contentions, appellate courts will not review questions not decided by the trial court. *McWhorter v. Clark*, 342 So. 2d 903 (Ala. 1977). The Supreme Court cannot put a trial court in error for failure to rule on a matter which, according to the record, was not presented to nor decided by it. *Defore v. Bourjois, Inc.*, 268 Ala. 228, 105 So. 2d 846 (1958)."

CAEC's procedural due process argument essentially progresses on three tracks. First, it argues that defendants subject to the imposition of punitive damages are entitled to the protection of a bifurcated trial. In the case at bar, CAEC made no motion to bifurcate the trial, and we will not hold the trial court in error for not bifurcating the trial on its own motion. See *Coburn v. American Liberty Ins. Co.*, 341 So. 2d 717 (Ala. 1977); A. R. Civ. P. 42(b).

The second procedural due process issue raised by CAEC is the failure of the trial court to charge the jury that clear and convincing evidence is necessary to support any assessment of punitive damages.

> "No party may assign as error the giving or failing to give a written instruction, or the giving of an erroneous, misleading, incomplete, or otherwise improper oral charge unless he objects thereto before the jury retires to consider its verdict, stating the matter to which he objects and the grounds of his objection."

A. R. Civ. P. 51. In the case at bar, we find nothing in the record that suggested to the trial court that it charge the jury on the "clear and convincing" standard; more importantly, we find no objection to the trial court's failure to so charge the jury.

The final ground upon which CAEC rests its procedural due process argument is that the trial court erred by not charging the jury with the guidelines set forth by this Court in *Hammond v. City of Gadsden*, 493 So. 2d 1374 (Ala. 1986) (and clarified in *Green Oil Co. v. Hornsby*, 539 So. 2d 218 (Ala. 1989)). As with the "clear and convincing" issue, however, CAEC did not object to the trial court's failure to give such an instruction, nor did CAEC request such an instruction.

In summary, we hold that all of CAEC's procedural due process arguments are not properly before this Court.

2. Substantive due process

Does the due process clause of the Fourteenth Amendment require that juries be guided by objective criteria in order to properly assess punitive damages? Stated perhaps more accurately, is it fundamentally unfair for a jury to award punitive damages without the guidance of objective criteria?

We recognize, indeed, we are faced almost daily with, the comments of various jurists, philosophers, scholars, and members of the national bar assailing the practicality in civil cases of the jury system and lamenting its continued existence. The three bases of criticism most often voiced

are the helplessness and lack of sophistication of jurors obligated to resolve issues in complex litigation; the tendency of modern juries to overcompensate injured tort victims for noneconomic damages; and the "unbridled" discretion jurors enjoy in imposing massive punitive damages awards. On the larger scale, those complaints, and the very issue under review here, are really attacks on the civil justice system as a whole.

Just because "juries have always done it that way" is no adequate response. But we must pause to recall that, until *very* recently, attacks on jury verdicts have not been rooted in the federal constitution. History instructs us that, in the typical case involving noneconomic damages and punitive damages, once the jury has been instructed on and determines liability, the amount of compensation to be awarded and the extent of punishment to be meted out are subjects unquestionably within the sacred domain of the jury's discretion. A large jury verdict was subject to judicial revision only if the form of the verdict was incorrectably flawed, or if the verdict was undeniably the product of some improper motive, such as bias or prejudice, or bent with an improper emotion, such as passion.

Tossed into the lessons of the past is the fact that the only damages available in a wrongful death action brought pursuant to Alabama law are punitive damages. The sanctity of human life, the noble goal of preserving human life, and society's desire to punish those whose conduct results in the loss of human life, have all been accepted by our Legislature as criteria outweighing the seeming anomaly of permitting punitive damages for simple negligence. This view rests on the premise that one may be adequately compensated for his injuries, but the value of a human life has no measure. Punishing the tort-feasor dissuades others from engaging in life-endangering conduct.

To paraphrase a famous (or infamous) quotation, the American system of civil justice is the worst in the world—

except for all of the rest. As the "problems" with the jury system have been pointed out with increasing frequency, so has the justice system responded.

If a defendant is dissatisfied with a jury's verdict, and feels that it is excessive, or otherwise flawed, he is entitled to the protection of a variety of safeguards. The defendant may move for remittitur and a new trial in the trial court, and may appeal as a matter of right from the denial of either. He is entitled to a *de novo* review of the jury's verdict on appeal.[2] The appellate courts in this state have the authority to order a new trial due to the excessiveness of the verdict, to conditionally order a new trial unless the plaintiff accepts a remittitur,[3] and to order the trial court to conditionally order a new trial unless the plaintiff accepts a remittitur.[4]

If a defendant properly moves the trial court to do so, the trial court is obligated to state on the record its reasons for either interfering with the jury's verdict or not interfering with it.[5] And, in making the determination of whether the verdict is excessive (or inadequate), a trial court is authorized to consider the following non-exclusive list of factors:

> " '(1) Punitive damages should bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that actually has occurred. If the actual or likely harm is slight, the damages should be relatively small. If grievous, the damages should be much greater.

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[2] Code 1975, § 12-22-71.

[3] *E.g., United Services auto. Ass'n v. Wade*, [Ms. 86-1511, March 17, 1989] ___ So. 2d ___ (Ala. 1989).

[4] *E.g., Gulf Atl. Life Ins. Co. v. Barnes*, 405 So. 2d 916 (Ala. 1981).

[5] *E.g., Hammond v. City of Gadsden*, 493 So. 2d 1374 (Ala. 1986).

" '(2) The degree of reprehensibility of the defendant's conduct should be considered. The duration of this conduct, the degree of the defendant's awareness of any hazard which his conduct has caused or is likely to cause, and any concealment or "cover-up" of that hazard, and the existence and frequency of similar past conduct should all be relevant in determining this degree of reprehensibility.

" '(3) If the wrongful conduct was profitable to the defendant, the punitive damages should remove the profit and should be in excess of the profit, so that the defendant recognizes a loss.

" '(4) The financial position of the defendant would be relevant.

" '(5) All the costs of litigation should be included, so as to encourage plaintiffs to bring wrongdoers to trial.

" '(6) If criminal sanctions have been imposed on the defendant for his conduct, this should be taken into account in mitigation of the punitive damages award.

" '(7) If there have been other civil actions against the same defendant, based on the same conduct, this should be taken into account in mitigation of the punitive damages award.' "

Green Oil Co. v. Hornsby, 539 So. 2d 218, 223-24 (Ala. 1989) (quoting *Aetna Life Ins. Co. v. Lavoie*, 505 So. 2d 1050, 1062 (Ala. 1987) (Houston, J., concurring)).

Punitive damages should not exceed an amount necessary to accomplish society's goals of punishment and deterrence. But the *degree* of punishment necessary to achieve those goals changes with each case. In the rarest cases, involving the most egregious conduct, juries should

be entitled to punish defendants so severely as to destroy them; justice demands that.[6] But in the typical punitive damages case, the award should punish without destroying. That, in a nutshell, is the way punitive damages and the civil justice system coexist.

The identical case tried to different juries will likely produce different results, but that does not necessarily smack of a lack of fundamental fairness. That is inherent in the nature of juries, given the imperfection of man and his system of justice. Some discretion must be afforded to juries to assess punitive damages as they see fit. We can envision no set of carved-in-granite standards that would guide every jury in every conceivable case. Discretion tolerates elasticity, but the jury's discretion is by no means unbridled. The "whims" of any given jury are still harnessed by the authority of the trial court and appellate courts.

Due to the safeguards now in place in Alabama, we find no merit to CAEC's allegation that its rights to substantive due process have been denied, or, based on the issues preserved for our review, that our wrongful death statute is unconstitutional. We have confidence in our system of civil justice and faith that that system will accommodate change as it is required.

We close our discussion with the wisdom of Mr. Justice Cardozo:

> "The eccentricities of judges balance one another. One judge looks at problems from the point of view of history, another from that of philosophy, another from that of social utility, one is a formalist, another a latitudinarian one is timorous of change, another dissatisfied with the present; out of the attrition of diverse minds there is

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[6] See *Ridout's-Brown Service, Inc. v. Holloway*, 397 So. 2d 125, 127-28 (Ala. 1981) (Jones, J., concurring).

> beaten something which has a constancy and uniformity and average value of greater than its component elements. The same thing is true of the work of juries. I do not mean to suggest that the product in either case does not betray the flaws inherent in its origin. The flaws are there as in every human institution. Because they are not only there but visible, we have faith that they will be corrected. There is no assurance that the rule of the majority will be the expression of perfect reason when embodied in constitution or in statute. We ought not to expect more of it when embodied in the judgments of the courts. The tide rises and falls, but the sands of error crumble."[7]

II.

CAEC argues that the trial court erred in failing to grant a directed verdict or JNOV in its favor on the issues of negligence and wantonness. We disagree.

This action was pending prior to June 11, 1987; therefore, Code 1975, § 12-21-12, as amended, does not apply and the applicable standard of review is the "scintilla rule." *Kizziah v. Golden Rule Insurance Co.*, 536 So.2d 943 (Ala. 1988).

In *Caterpiller Tractor Co. v. Ford*, 406 So.2d 854, 856 (Ala. 1981), this Court stated the standard of review applicable to a directed verdict:

> "A directed verdict is proper only where there is a complete absence of proof on an issue material to the claim or where there are no disputed questions of fact on which reasonable people could differ. *Deal v. Johnson*, 362 So.2d 214 (Ala. 1978)
> . . . .

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[7] Cardozo, *The Nature of the Judicial Process* 143 (1921)

> "In addition, the trial court must view the entire evidence, and all reasonable inferences which a jury might have drawn therefrom, in the light most favorable to the non-moving party. *Alabama Power Company v. Taylor*, 293 Ala. 484, 306 So.2d 236 (1975); *Vintage Enterprises, Inc., v. Cash*, 348 So.2d 476 (Ala. 1977)."

See also *Orr v. Turney*, 535 So. 2d 150, 154 (Ala. 1988).

A. Negligence

There was sufficient evidence of negligence to withstand a motion for a directed verdict and a motion for a judgment notwithstanding the verdict. As a supplier of electricity, CAEC is not an insurer of the safety of the general public and is not under an obligation to so safeguard its lines or equipment that by no possibility can injury result therefrom. The duty of an electrical company is to exercise that degree of care commensurate with the danger involved. *Alabama Power Co. v. Tatum*, 293 Ala. 500, 306 So.2d 251 (1975); *Alabama Power Co. v. Berry*, 254 Ala. 228, 48 So.2d 231 (1950).

> " 'In *Bush v. Alabama Power Co.*, 457 So.2d 350, 353 (Ala. 1984), the Court restated the duty of a power company with *regard to the use and location of uninsulated electrical lines*: "The duty of an electric company, in conveying a current of high potential, *to exercise commensurate care under the circumstances, requires it to insulate its wires, and to use reasonable care to keep the same insulated*, wherever it may reasonably be anticipated that persons, pursuing business or pleasure, may come in contact therewith. This statement of the rule implies that, in the absence of statute or municipal ordinance, it is not necessary to insulate wires which are so placed that no one could reasonably be expected to come in proximity to them." *Foster v. Alabama Power*

> *Co.*, 395 So.2d 27, 30 (Ala. 1981), citing Curtis on the *Law of Electricity*, § 510. In other words, Alabama Power must either insulate its electrical lines, or locate them in a position where they pose no danger to human life. *However, the duty to insulate does not arise absent notice, actual or constructive, that persons may come into contact with the uninsulated wires. Alabama Power Co. v. Alexander*, 370 So.2d 252 (Ala. 1979).' "

Alabama Power Co. v. Cantrell, 507 So.2d 1295, 1297 (Ala. 1986) (quoting *Alabama Power Co. v. Brooks*, 479 So.2d 1169, 1172 (Ala. 1985)). (Emphasis added.)

Tapley's expert testified that the height of the line was in violation of the NESC, because "given local conditions were not considered." He testified that "local conditions" means that "you should take into consideration everything that's possible to take into consideration to preserve the safety of the lines." Although this conflicts with other expert testimony, this is sufficient evidence of negligence for the jury to consider, for CAEC erected the line lower than the body of the trailer dump would reach when in a raised position. Even though CAEC assumed that there would be no dumping in the area of the line, a fact question existed as to whether CAEC should have foreseen that trailer dumps would be raised to an upright position in that area. Negligence can be predicated upon a defendant's failing to appreciate the hazards of conditions it creates. *Bush v. Alabama Power Co.*, 457 So.2d 350 (Ala. 1984). We hold that the trial court did not err in failing to grant a directed verdict or JNOV in favor of CAEC on the negligence count.

B. Wantonness

What constitutes wanton misconduct depends upon the facts presented in each particular case. *Brown v. Turner*, 497 So. 2d 1119 (Ala. 1986); *Trahan v. Cook*, 288 Ala. 704,

265 So.2d 125 (1972); *Westbrook v. Gibbs*, 285 Ala. 223, 231 So.2d 97 (1970). In *Lynn Stickland Sales & Service, Inc. v. Aero-Lane Fabricators, Inc.*, 510 So.2d 142 (Ala. 1987), the majority of this Court made it perfectly clear that wantonness, which requires some degree of conscious culpability, is not to be confused with negligence, (i.e., mere inadvertence):

> "Wantonness is not merely a higher degree of culpability than negligence. Negligence and wantonness, plainly and simply, are qualitatively different tort concepts of actionable culpability. *Implicit in wanton, willful, or reckless misconduct is an acting, with knowledge of danger, or with consciousness, that the doing or not doing of some act will likely result in injury. . . .*
>
> "Negligence is usually characterized as inattention, thoughtlessness, or heedlessness, a lack of due care; whereas *wantonness is characterized as an act which cannot exist without a purpose or design, a conscious or intentional act.* 'Simple negligence is the inadvertent omission of duty; and *wanton or willful misconduct is characterized as such by the state of mind with which the act or omission is done or omitted.' McNeil v. Munson S.S. Lines*, 184 Ala. 420, 425, 63 So. 992 (1913). [Emphasis added.] . . .
>
> ". . . .
>
> 'Willful and wanton conduct has a well-defined meaning at law. It is sometimes expressed in terms of "reckless disregard of the safety of another." *Willful and wanton conduct should not be confused with negligence. It has been correctly stated that the two concepts are as "unmixable as oil and water."* ' [Citation omitted, emphasis added.]

> " '. . . *Willfulness or wantonness imports premeditation, or knowledge and consciousness that the injury is likely to result from the act done or from the omission to act*, and strictly speaking, is not within the meaning of the term "negligence," which conveys the idea of inadvertence, as distinguished from *premeditation or formed intention.*' " [Citation omitted, emphasis added.]

510 So. 2d at 145-46 (emphasis added).

Is there a scintilla of evidence that, in placing the uninsulated line at the place and height that it was erected, CAEC knew that injury would likely result? We find the requisite scintilla of evidence to support a wantonness claim from Holman's testimony:

> "Q. . . . And, the decision was made not to put an orange ball on this line; wasn't it?
>
> "A. We didn't have any.
>
> "Q. You didn't have any? Oh, you didn't have any? You would have put them up there?
>
> "A. Yes, sir, we would've put them up there.
>
> "Q. But, you didn't have any right then. You went ahead and hooked that power up; didn't you?
>
> "A. Yes, sir, we hooked the power up.
>
> ". . . .
>
> "Q. . . . [Y]ou don't leave it up to the customer as to orange balls, do you? You make that decision.
>
> "A. Yes, sir.
>
> "Q. And, you had already made that decision to put orange balls up, but you didn't have any in stock.

"A. Yes, sir.

"Q. And, orange balls are designed for safety; aren't they? That's what you told me on—.

"A. Well, you can call it that. A reminder, ever how you want to use it.

"Q. But, its designed—its a safety device.

"A. To let you know its up there.

". . . .

"Q. You don't buy, you don't adhere, you don't adopt the theory that orange balls serve no real or useful purpose?

"A. Well, we hoped they would.

"Q. So, you say that orange balls do serve a real or useful purpose?

"A. We hoped people would look at them.

"Q. And, that's why you put them up there; isn't that true?

"A. To try and remind people that its up there.

"Q. And, that's why you intended to put them up here on this one; isn't that true?

"A. Yes, sir.

". . . .

"Q. . . . But, Mr. Holman, you intended to put a ball right here, even though you tell us that there wasn't going to be any dumping. You intended to put a ball over the roadway, and you didn't have any in stock: Isn't that what you told us?

"A. Yes, sir.

"....

"Q. Mr. Holman, am I understanding you correctly, that you say you had always intended in spite of what Mr. Ingram told you, that there wasn't going to be any high equipment, that you always intended, from the very beginning, to put a ball over there?

"....

"A. Yes, sir, we intended to put a ball on it."

Although some other witnesses testified that orange balls were used as a warning for low flying aircraft and were helpful in seeing power lines from a distance, Holman does not further explain why he intended to place orange balls on the line. Furthermore, despite knowing the approximate height to which the truck beds would rise and despite knowing that truck beds were raised in several locations on the premises, CAEC nevertheless erected the lines well below the height to which the truck beds were raised. Viewing this testimony and evidence in the light most favorable to Tapley, we cannot hold that, as a matter of law, it would be unreasonable for a jury to infer that Holman, as district manager of CAEC, was aware that there was a likelihood that equipment might come in contact with the uninsulated line and that, if it did so, injury was likely to occur. This was sufficient for the trial court to submit the issue of wantonness to the jury.

III.

CAEC next argues that Tapley was contributorily negligent as a matter of law. In a recent case somewhat similar to the one before us today, we did find contributory negligence as a matter of law. See *Watters v. Bucyrus-Erie Co.*, 537 So. 2d 24 (Ala. 1989). As with negligence generally, however, a finding of contributory negligence turns on the facts and circumstances unique to each case;

for that reason, contrary to the suggestion of Justice Houston's dissenting opinion, we need not overrule *Watters*, for the holding in that case, too, was dependent upon its own particular facts. To be sure, the conduct of the decedent in this case was such that the defendant could justifiably argue, with strong conviction, that the jury should deny recovery because of the decedent's contributory negligence.[8] That can not be our focus, however. Contributory negligence is an affirmative defense that the defendant bears the burden of proving. Rule 8(c), A. R. Civ. P. "Contributory negligence is for the jury where there is a scintilla of evidence to the contrary. *Elba Wood Products, Inc. v. Brackin*, 356 So. 2d 119 (Ala. 1978)." *Bullen v. Roto Finishing Systems*, 435 So. 2d 1256, 1259 (Ala. 1983); see *Hatton v. Chem-Haulers, Inc.*, 393 So. 2d 950, 954 (Ala. 1980).

In order to sustain a finding of contributory negligence as a matter of law, there must be a finding that the plaintiff put himself in danger's way, *Mackintosh Co. v. Wells*, 218 Ala. 260, 118 So. 276 (1928), and a finding that the plaintiff appreciated the danger confronted, *Wilson v. Alabama Power Co.*, 495 So. 2d 48 (Ala. 1986); *Marquis v. Marquis*, 480 So. 2d 1213 (Ala. 1985); *Baptist Medical Center v. Byers*, 289 Ala. 713, 271 So. 2d 847 (1972); *Mackintosh Co. v. Wells, supra*. Moreover, it must be demonstrated that the plaintiff's appreciation of the danger was a conscious appreciation at the moment the incident occurred. *Marquis v. Marquis, supra; Elba Wood Products, Inc. v. Brackin, supra*. Mere "heedlessness" is insufficient to warrant a finding of contributory negligence as a matter of law. *Decatur Light, Power & Fuel Co. v. Newsom*, 179 Ala. 127, 59 So. 615 (1912).

---

[8] This Court might be willing to again entertain, in an appropriate case, the idea of adopting the doctrine of comparative negligence. See *Golden v. McCurry*, 392 So. 2d 815 (Ala. 1981.)

Indulging all favorable presumptions to sustain the trial court's conclusion, *Marquis v. Marquis, supra*, and viewing the tendencies of the evidence in the light most favorable to the party not urging error, we are unable to impose upon this plaintiff the extraordinary consequences of a finding of contributory negligence as a matter of law. After thoroughly scouring the record, we find no evidence that the plaintiff's decedent knew the height of the subject power lines; no evidence that he knew the height to which his dump bed would rise; and no evidence that he knew the lines were uninsulated. He did know that CAEC had been at the plant and that CAEC had made a studied and deliberate decision on how to erect the lines; he therefore may well have assumed that the lines would have been high enough to accommodate his truck while in operation. Finally, we will not hold that he deliberately raised his dump bed into the wires and then purposefully electrocuted himself; such a holding would be repugnant to simple logic and to the tendencies of the evidence presented.

We conclude that there was sufficient evidence to contradict CAEC's defense of contributory negligence and thus to warrant resolution of this issue by the jury.

IV.

CAEC maintains that the Legislature acted arbitrarily and irrationally in excepting wrongful death actions from the operation of §§ 6-11-20 and -21, Code 1975. This exception is codified at § 6-11-29. Because this cause of action was pending prior to June 11, 1987, however, these statutes are inapplicable. See Code 1975, § 6-11-30. While we express no view on the merits of this issue, we observe that, for whatever reason, it is clear that the Legislature's purposeful exclusion of wrongful death actions is totally consistent with the wrongful death statute and with this Court's interpretation and application thereof.

V.

CAEC next contends that the trial court erred in denying its motion *in limine* with respect to all evidence of orange markers or balls. Prior to trial, in considering the motion, the following exchange between the court and one of CAEC's lawyers took place:

> "COURT: If the evidence will support their contention, that is, in every case they should have put [the markers or balls] up there, maybe they should. I don't know what Judge McElroy says [an apparent reference to C. Gamble, *McElroy's Alabama Evidence* (3d ed. 1977)]. It may be that [CAEC's] practice is to put balls up there and make them visible and to call people's attention to the fact that they are there.
>
> "PETE COBB: Judge, we just insist, that before any mention, that I except to the plaintiff being able to mention three. But, before any mention of more than three by anybody comes on, we want a ruling from the court as to whether or not they can mention more than three.
>
> "COURT: We will go with that for the time being until tomorrow morning."

That colloquy consists of the entire "ruling" on the motion *in limine*. Throughout the plaintiff's opening statement, and upon examination of several witnesses during the plaintiff's case-in-chief, several references were made to orange balls or markers—*all without objection*.

In *Perry v. Brakefield*, 534 So. 2d 602 (Ala. 1988), we summarized *Robinson v. Kierce*, 513 So. 2d 1005 (Ala. 1987), and *Killingsworth v. Killingsworth*, 283 Ala. 345, 217 So. 2d 57 (1968), and the law of issue preservation as it relates to motion *in limine* practice. "The clear holding of these cases is that unless the trial court's ruling on the motion *in limine* is absolute or unconditional, the

ruling does not preserve the issue for [appellate review]." *Perry*, 534 So. 2d at 606. If the ruling is not absolute, proper objections at trial are necessary to preserve the issue. *Liberty Nat'l Life Ins. Co. v. Beasley*, 466 So. 2d 935, 936 (Ala. 1985). Because the trial court's ruling in the instant case was not absolute, and because several subsequent references to orange balls or markers were made without objection, we conclude that the propriety of the trial court's action is not before us.

VI.

The sixth issue raised by CAEC involves the trial court's granting of the plaintiff's motion *in limine* to exclude evidence of the plaintiff's decedent's violation of Code 1975, § 37-8-52, and the trial court's failure to charge the jury on the effect of that section. We address each contention separately.

A. Motion *in limine*

Plaintiff filed a motion *in limine* to exclude any testimony, argument, or other reference to § 37-8-52. We have searched the record and find no ruling on that motion whatsoever. We can not, then, put the trial court in error on this issue.

B. Jury charge

CAEC sought to have the jury charged on the effect of § 37-8-52, and, when the trial court failed to so charge, it interposed a general objection. "[N]ot only must an objection to the trial court's refusal to give an instruction be made, but the objection must be made specifically and must be supported by grounds in order for review to be [heard] in the appellate court." *Burnett v. Martin*, 405 So. 2d 23, 28 (Ala. 1981). The general objection in the case at bar, merely "to the court's failure to give written charge . . . 20," was inadequate to preserve this issue for review.

VII.

The final issue raised by CAEC involves remarks made by the plaintiff's lawyer in his closing argument.

At one point, the plaintiffs' lawyer argued:

> "I can stand here and tell you that when you are flying an airplane, and it starts to go down, worth 26 million dollars, they tell that pilot to jump out.
>
> ". . . .
>
> "Let's ring the bell of justice. Let's believe in this lady who just started out, finally, after three children, and then finally has an opportunity to enjoy life with her lifelong mate . . . ."

Without commenting on the propriety of these arguments, we note that the trial court sustained CAEC's objections, overruled its motion for a mistrial, and as to the latter argument, promptly instructed the jurors to "disregard that argument." We also note that, in its charge to the jury, the court instructed the jurors that the verdict must be based "on the law that I have given you and the evidence in this case," and that the "verdict can not be based on sympathy, bias, or prejudice."

Assuming, without deciding, that the arguments made were improper, we hold that the trial court's actions were sufficient to prevent prejudicial error. See *Black Belt Wood Co. v. Sessions*, 514 So. 2d 1249, 1254 (Ala. 1986).

Conclusion

Because we have found no reversible error in this case, the judgment of the trial court is due to be affirmed.

AFFIRMED.

Hornsby, C.J., and Jones, Shores, Adams, and Kennedy, JJ., concur.

Almon, J., concurs in the result.

Maddox, Houston, and Steagall, JJ., dissent.

Central Alabama Electric Cooperative v. Tapley

MADDOX, JUSTICE (Dissenting).

I cannot distinguish the facts of this case from those of *Watters v. Bucyrus-Erie Co.*, 537 So.2d 24 (Ala. 1989); therefore, I must respectfully dissent.

While I need not reach, in this case, the substantive due process issues concerning the award of punitive damages, I have previously addressed this question. See, my separate opinion in *Alabama Power Co. v. Cantrell*, 507 So.2d 1295 (Ala. 1986), in which I concurred in part and dissented in part, and my concurring and dissenting opinion in *Industrial Chemical & Fiberglass Corp. v. Chandler*, [Ms. 86-381, 86-385, January 20, 1989], ___ So.2d ___ (Ala. 1989), in which I stated that I thought the "excessive fines" clauses of both the state and federal constitutions apply to punitive damages in civil cases. As I stated in Justice Houston's case of *Wilson v. Dukona Corp.*, [Ms. 86-1066, April 28, 1989] ___ So.2d ___ (Ala. 1989), I want to await the decision in the case of *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 845 F.2d 404 (2d Cir. 1988), cert. granted in part, ___ U.S. ___ , 109 S.Ct. 527 (No. 88-556, Dec. 5, 1988), before I write further on this issue.

Central Alabama Electric Cooperative v. Janice C. Tapley

HOUSTON, JUSTICE (dissenting).

I find it difficult not to concur with any opinion that cites *The Nature of the Judicial Process* (1921), for I have great respect for and stand in awe of the man who was the 75th United States Supreme Court Justice, Mr. Justice Benjamin N. Cardozo, and his judicious writings. However, I do not reach the substantive due process issue, for I

would reverse and remand on the issue of contributory negligence.[1]

The majority admits that the facts in this case are "somewhat similar to" those in *Watters v. Bucyrus-Erie Co.*, 537 So.2d 24 (Ala. 1989). I would say that I could not hold as the majority does without expressly overruling *Watters*. There is an overwhelming weight of evidence of contributory negligence.

The majority opinion recites the fact that the line with which Tapley's trailer dump came in contact had been erected by CAEC within a week of Tapley's death. The majority opinion omits to recite that Tapley knew that the line had been installed. Tapley helped install the line within the week before his death. This evidence is undisputed. Tapley and the driver with whom he normally drove discussed the location of the service pole to which the line was attached. Tapley, an experienced truck driver, had worked for the asphalt plant for approximately six years. He attended safety meetings at least twice a month, where the hazard of overhead power lines was regularly discussed. In addition, every truck or trailer in the operation, including Tapley's, had clearly visible warning labels:

"CAUTION

"STAY AT CONTROLS WHILE DUMPING AND LOWER BODY IMMEDIATELY IF BODY LEANS OR SHIFTS TO ONE SIDE WHILE DUMPING.

"PRIOR TO RAISING BODY, *CHECK TO BE SURE BODY WILL NOT CONTACT POWER LINES OR OTHER OBSTRUCTIONS WHEN IN THE UP POSITION.*" [Emphasis added.]

"CAUTION

"1. Improper operation of this unit can result

---

[1] In reference to the discussion in Section IV of the *per curiam* opinion, I readopt my reasoning in footnote 10 of my dissent in *Tatum v. Schering Corp.*, 523 So.2d 1042, 1060 (Ala.

in serious injury. Do not operate unless you have been properly instructed and are familiar with the operation of this unit.

". . . .

"7. Do not leave vehicle during dumping cycle. Remain at the controls. Release the tail gate controls before lifting the body.

". . . .

"11. *Never raise body where overhead obstructions may exist. Never raise body in proximity of power lines as serious injury may result.*" [Emphasis added.]

The accident happened at 7:45 A.M. The line was visible from directly underneath and for a distance of 100 to 200 yards. All of this evidence is undisputed. If any of this was disputed, it could be disregarded in favor of the contradictory evidence, in viewing the evidence most favorably to the winning side, but it is all undisputed; therefore, it must be considered in reviewing the trial court's refusal to grant CAEC's motions.

In its final order, the trial court stated that "[t]here was ample evidence upon which the jury could have found [Tapley] guilty of contributory negligence. . . ." I conclude that the facts were such that all reasonable people must draw the same conclusion—that Tapley was contributorily negligent; and, therefore, that Tapley was contributorily negligent as a matter of law. *Hatton v. Chem-Haulers, Inc.*, 393 So.2d 950 (Ala. 1980). This is consistent with this Court's holding in *Watters; Wilson v. Alabama Power Co.*, 495 So.2d 49 (Ala. 1986); *Quillen v. Quillen*, 388 So.2d 985 (Ala. 1980).

CAEC moved for a directed verdict as to the issue of contributory negligence at the end of all the evidence, arguing that it was entitled to a judgment as a matter of

law on the negligence count because of its affirmative defense of contributory negligence. CAEC also filed a motion for a judgment notwithstanding the verdict, in which it realleged that same ground. CAEC's motion for a directed verdict and motion for a judgment notwithstanding the verdict should have been granted on CAEC's affirmative defense of contributory negligence.

> "Where a defendant files a motion for directed verdict as to a count which is not supported by the evidence, detailing with specificity the grounds upon which the particular count is not supported by the evidence and the Court denies the motion, a general jury verdict will not be presumed to have been returned on a count which is supported by the evidence. *John Deere Industrial Equipment Co. v. Keller*, 431 So.2d 1155 (Ala. 1983); *Aspinwall v. Gowens*, 405 So.2d 134 (Ala. 1981)."

Russellville Production Credit Ass'n v. Frost, 484 So.2d 1084, 1087-88 (Ala. 1986); see also *C & S Financial Services v. Bradley*, 501 So.2d 1218 (Ala. 1987); *Mobile Dodge, Inc. v. Alford*, 487 So.2d 866 (Ala. 1986). I would reverse and remand for a new trial on wantonness.

I do not understand footnote eight of the *per curiam* opinion. Unless the majority of this Court is convinced that the *ratio decidendi* of the doctrine of contributory negligence would not " 'hypothetically be consented to today by the conscience and the feeling of justice of the majority of all those whose obedience is required by [that] rule of law,' " *Southern States Ford, Inc. v. Proctor*, [Ms. 87-331, March 10, 1989] ___ So.2d ___ (Ala. 1989) (Houston, J., concurring specially), then I would assume that this Court would follow the doctrine of *stare decisis*.

Steagall, J., concurs.

[R. 70]

APPENDIX F

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

CIVIL ACTION NO. CV-87-448

MARTHA HOFFMANN SANDERS,
Mother of NORMA DAVISON HOFFMANN,
deceased minor,

Plaintiff

vs.

DEBBY D. CLARDY, et al.,

Defendants

AMENDED ANSWER OF DEFENDANT DEBBY D. CLARDY, IN HER REPRESENTATIVE CAPACITY AS EXECUTRIX OF THE ESTATE OF THOMAS EUGENE CLARDY AND CLARDY REALTY, INC.

Come now the defendants, Debby D. Clardy, in her representative capacity as Executrix of the Estate of Thomas Eugene Clardy and Clardy Realty, Inc., and amends their answer previously filed to include the following defenses.

1. Defendants say that the imposition of punitive damages against them under Alabama law violates their rights under the due process clauses of the Fourteenth Amendments to the Alabama and United States Constitutions.

2. Defendants say that the imposition of punitive damages against them under Alabama law violates the equal protection clauses of the Fourteenth Amendments to the Alabama and United States Constitutions.

3. Defendants say that the imposition of punitive damages against them under Alabama law violates the Excessive Fines Clauses of the Eighth Amendments to the Alabama and United States Constitutions.

[R. 71]

4. Defendants say that the imposition of purely punitive damages, jointly and severally, violates their rights under the due process clauses of the Fourteenth Amendments to the Alabama and United States Constitutions.

5. Defendants say that the imposition of purely punitive damages, jointly and severally, violates the Equal Protection Clauses of the Fourteenth Amendments to the Alabama and United States Constitutions.

6. Defendants say that the imposition of purely punitive damages, jointly and severally, violates the Excessive Fines Clause of the Eighth Amendments to the Alabama and United States Constitution.

/s/ Michael B. Beers
Michael B. Beers

/s/ Julian P. Hardy
Julian P. Hardy

ATTORNEYS FOR ABOVE-NAMED DEFENDANT

OF COUNSEL:

MILLER, BEERS & SMITH
P. O. Box 1461
138 Adams Avenue
Montgomery, Alabama 36104

PRITCHARD, McCALL & JONES
901 Brown Marx Tower
Birmingham, Alabama 35203

APPENDIX G

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

CIVIL ACTION NO. CV-87-448

MARTHA HOFFMANN SANDERS, Mother of NORMA DAVISON HOFFMAN, deceased minor,

Plaintiff

vs.

DEBBY D. CLARDY, et al.,

Defendants

MOTION FOR DIRECTED VERDICT

Comes now the defendant, Clardy Realty, Inc., and requests this Honorable Court to enter a directed verdict in favor of Clardy Realty, Inc., on the ground that there is (1.) no evidence to sustain a verdict against Clardy Realty, Inc., (2.) Further, that the undisputed evidence is that Clardy Realty, Inc. did not come into existence until after the date of the accident referred to in the complaint, (3.) That the imposition of punitive damages, under Alabama law, is unconstitutional under the excessive fines, due process and equal protection clauses of the 8th and 14th amendments to the Alabama and United States Constitutions, (4.) That the imposition of punitive damages where the liability is joint and several is unconstitutional under the excessive fines, due process, and equal protection clauses of the 8th and 14th amendments to the Alabama and United States Constitutions.

/s/ Michael B. Beers
Michael B. Beers
/s/ Julian P. Hardy
Julian P. Hardy

ATTORNEYS FOR CLARDY REALTY, INC.

OF COUNSEL:

MILLER, BEERS, & SMITH
P. O. Box 1461
Montgomery, Alabama 36104

CERTIFICATE OF SERVICE

I hereby certify that I have hand delivered, in open Court, a copy of the above and foregoing Motion to all counsel to this lawsuit this 13th day of January, 1988.

/s/ Julian P. Hardy
OF COUNSEL

[RT. 511]

* * * * *

MR. HARDY: Your Honor, like I said, we're—ours is partially typed, partially written. [RT. 512] We're getting ready to submit it to the Court and we raise in our answer hereto the punitive damages, the constitutionality of it, particularly in this application, that issue. I assume it's the same ruling.

THE COURT: If you want to raise any additional grounds, you'd better state them now.

MR. HARDY: The grounds are those that we have set out in our amended answer, that we're incorporating in our motion.

THE COURT: Your amended answer and what you've told me here in court, but I can't consider what I haven't ever seen.

MR. HARDY: Well, it's in the court file.

THE COURT: I understand, but in case you have a motion that you haven't filed, or something.

MR. HARDY: Well, before I made my argument, I told them in due of the fact that Richard was closing quickly, we're right now concluding our motions.

THE COURT: Do you have any additional grounds or any motions that you're typing?

MR. HARDY: Yes, sir, and that has just been argued, or mentioned by Mr. Braswell and Mr. Wilson.

[RT. 513]

THE COURT: The constitutionality of punitive damages?

MR. HARDY: Well, let me be specific: Number one . . .

THE COURT: What I'm saying, you can't blindside me and say I overruled a motion that I never saw.

MR. HARDY: That's what I'm trying to say. Number one, we challenge the constitutionality under the due process clause of the 14th Amendment to Alabama and Federal Constitutions, equal protection clauses of the 14th Amendment to Alabama and Federal Constitutions, and the excessive fines clauses for both Constitutions.

We challenge both punitive damages, generally, in Alabama, because of the lack of any adequate guidelines about their imposition. But number two, under those same three constitutional provisions, State and Federal, we challenge the constitutionality in this state of the imposition of punitive damages, jointly and severally without any importionment, because it seems to me that the arbitrariness and the unfairness of punitive damages, [RT. 514] generally, in Alabama, is only compounded when they are imposed jointly and severally.

THE COURT: I understand. The law is, as y'all have argued, I don't think it's a fair law, the joint and several liability, but I'm not in the job of making the law.

MR. HARDY: Yes, sir. We just want to make the record clear, and we say particularly is joint and several liability unfair when the only damage are purely punitive. We say, in that case, it seems to us it's even more fundamentally unfair than the case where the damages are compensatory, because the damages are in the nature of punishing someone for someone else's conduct.

THE COURT: I deny your motion, even though I agree with you.

* * * * *

APPENDIX H

[R. 85]

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

CIVIL ACTION NO. CV-87-448

MARTHA HOFFMANN SANDERS, Mother of NORMA DAVISON HOFFMANN, deceased minor,

Plaintiff

vs.

DEBBY D. CLARDY, et al.,

Defendants

MOTION FOR DIRECTED VERDICT

(AT THE CLOSE OF ALL TESTIMONY)

Comes now the defendant, Clardy Realty, Inc., and requests this Honorable Court to enter a directed verdict in favor of Clardy Realty, Inc., on the following grounds:

1. There is no evidence to sustain a verdict against Clardy Realty, Inc.

2. Further, that the undisputed evidence is that Clardy Realty, Inc., did not come into existence until after the date of the accident referred to in the complaint.

3. That the imposition of punitive damages, under Alabama law, is unconstitutional under the excessive fines clauses of the 8th Amendments, and due process and equal protection clauses of the 14th Amendments ot the Alabama and United States Constitutions.

[R. 86]

4. That the imposition of purely punitive damages where the liability is joint and several is unconstitutional under the excessive fines clauses of the 8th Amendments, and due process, and equal protection clauses of the 14th Amendments to the Alabama and United States Constitution.

/s/ Michael B. Beers
Michael B. Beers
/s/ Julian P. Hardy
Julian P. Hardy

ATTORNEYS FOR DEFENDANT,
CLARDY REALTY, INC.

OF COUNSEL:

MILLER, BEERS & SMITH
P. O. Box 1461
Montgomery, Alabama 36102

PRTICHARD, McCALL & JONES
901 Brown Marx Tower
Birmingham, Alabama 35203

CERTIFICATE OF SERVICE

I hereby certify that I have hand delivered, in open Court, a copy of the above and foregoing Motion to all counsel to this lawsuit this 13th day of January, 1988.

/s/ Julian P. Hardy
OF COUNSEL

[RT. 707]

* * * * *

THE COURT: Are you resting now?

MR. BEERS: Yes, sir; we're resting.

THE COURT: Are there any motions?

MR. BEERS: Clardy Realty, as well as Debby Clardy in her representative capacity as executrix of the Estate of Eugene Clardy, we're going to wait until the end of all the evidence.

MR. BRASWELL: You want our first witness?

THE COURT: I'm asking have you got any motions now?

MR. BEERS: Can't we just do it at the end of all the evidence?

MR. BRASWELL: Judge, do you want us to make our last directed verdict?

[RT. 802]

* * * * *

MR. BEERS: At this time, we refile our motion for directed verdict, setting forth those same issues that we have addressed with regards to Clardy Realty, Incorporated, and we emphasize to the Court that during the Defendants' statement of the case, that it was even more clarified as to the lack of sintilla of evidence that Mr. Clardy was on business at the time of this accident.

THE COURT: Your motion is also denied.

* * * * *

APPENDIX I

[R. 183]

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

CIVIL ACTION NO. CV 87-448-G

MARTHA HOFFMAN SANDERS etc.

Plaintiff

v.

DEBBY D. CLARDY et al

Defendants

BRIEF IN SUPPORT OF MOTION FOR JUDGMENT NON OBSTANTE VEREDICTO OR ALTERNATIVELY NEW TRIAL

Defendants Debby D. Clary as Executrix of the Estate of Thomas Eugene Clardy and Clardy Realty, Inc. have previously filed their motion for judgment non obstante veredicto or alternatively for new trial. This brief is offered in support of that motion. Numerous grounds are stated in support of the motion previously filed. In the interest of brevity, not all of those grounds will be addressed in this brief. However, the defendants do not waive any of the grounds stated in said motion.

* * * * *

[R.190]

IV. The punitive damage award violates the due process clause of the Fourteenth Amendment and excessive fines clause of the Eighth Amendment, as well as Article 1, §§ 6 and 13 of the Alabama Constitution.

The Supreme Court of the United States recently recognized the importance of the constitutional concerns raised

by the imposition of unlimited punitive damage awards. In *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 828-29 (1986), that Court declared that the argument that the "lack of sufficient standards governing punitive damages awards in Alabama violates the Due Process Clause . . . raise[s] [an] important issue[ ] which . . . must be resolved . . . ." The question whether the subjection of defendants to unlimited monetary punishment violates the Due Process Clause or Excessive Fines clause is currently before that Court in *Bankers Life and Casualty Co. v. Crenshaw*, No. 85-1765 (argued Nov. 30, 1987). Similar questions are also currently pending before the Supreme Court of Alabama in *Industrial Chemical & Fiberglass Corp. v. Chandler*, No. 86-381, a wrongful death action involving a $5,000,000 punitive damage judgment. The Alabama Supreme Court heard oral argument in that case on October 20, 1987. The dispositions of *Bankers Life* and *Industrial Chemical* will bear heavily on the ultimate resolution of the instant challenge to the $2,750,000 punitive award returned by the jury. If either case is decided prior to [R. 191] a decision on the defendants' post-trial motion, counsel will notify the court as soon as possible.

The Supreme Court of Alabama has made clear that punitive damages are awarded to serve the governmental function of punishing conduct perceived as antisocial in order to achieve the twin goals of retribution and deterrrrence. *Deaton, Inc. v. Burroughs*, 456 So. 2d 771, 776 (Ala. 1984); *Nettles v. Bishop*, 289 Ala. 100, 266 So. 2d 260, 262 (1970). The wrongful death of a minor statute authorizes the imposition of an unlimited punitive damage award for any negligent act causing the death of a minor child. Ala. Code §6-5-391 (1975). The Supreme Court of Alabama has consistently held that the damages recoverable under §6-5-391 are purely punitive in nature, with no compensatory or actual damages component. *See, e.g., Eich v. Town of Gulf Shores*, 293 Ala. 95, 300 So. 2d 354, 356 (1974). The jury was so instructed in this case, over the

objection of defendants. (TR pp. 853-54, 868-870, 873-74, 885-87).

Subjection of the defendants to such unlimited fines constitutes arbitrary and capricious punishment which is inconsistent with constitutiional restrictions embodied in the Due Process Clause and the Excessive Fines Clause of the United States Constitution, as well as their counterparts in the Alabama Constitution, Art. I, §§6 and 15.

[R. 192]

A. Section 6-5-391 of The Alabama Code is unconstitutional on its face and as applied in this case because it fails to limit the maximum size of punitive damage awards which it authorizes.

The judicial imposition of punitive fines, including punitive damages, is subject to traditional standards of due process. In *Giaccio v. Pennsylvania*, 382 U.S. 399 (1966), the Supreme Court struck down, under the Due Process Clause of the Fourteenth Amendment, a state statute authorizing a jury to award court costs against the defendant without any guidelines. The Court condemned the statute as "leav[ing] to the jury such broad and unlimited power in imposing costs. . . that the jurors must make determinations of the crucial issue on their own notions of what the law should be . . . ." 382 U.S. at 403. The Supreme Court's Due Process Clause analysis focused on the position that statutes cannot constitutionally leave to a jury the unfettered power to impose financial sanctions, whether labelled "civil" or "criminal," in an arbitrary fashion.

Section 6-5-391 of the Alabama Code authorizes a plaintiff to recover punitive damages in any amount "as the jury may access," Ala. Code §6-5-391, without any guidelines. *See Eich v. Town of Gulf Shores*, 300 So. 2d at 356. Section 6-5-391 therefore violates the Due Process Clause of the Fourteenth Amendment and Article I, §6 of the Alabama Constitution because of the lack of any pre-

established limit on the amount of punitive damages which a jury may impose.

* * * * *

[R. 194]

C. The indiscriminate imposition of joint punitive damage awards against each defendant without regard to culpability violates the Due Process and Excessive Fines Clauses.

The jury in this case was instructed, over defendants' objections, that if they were to find for plaintiffs, a single punitive damages award should be imposed on all defendants. (TR pp. 836-37, 852, 870). Constitutional considerations, however, required the jury to apportion any punitive damages among the defendants according to each defendant's level of culpability.

Due process prohibits granting juries the unfettered power to impose financial sanctions in an arbitrary fashion. *Giacco v. Pennsylvania*, 382 U.S. at 403. Similarly, the Excessive Fines Clause of the United States and Alabama Constitutions prohibits the imposition of fines, whether labelled "civil" or "criminal," that are disproportionate to the offense in question. By prohibiting the jury from considering the varying degrees of culpability of the various defendants, the court's instruction required the jurors to impose a single punitive damages award against all defendants, with each being jointly and severally liable for the entire award. The imposition of punitive damages in such a manner was clearly arbitrary and [R. 195] prevented the jury from imposing punitive damages that were proportionate in amount to the culpability of each defendant. Consequently the $2,750,000 fine in this case violates the Due Process and Excessive Fines clauses, entitling defendants to JNOV or, in the alternative, a new

trial in which the jury is instructed to apportion any punitive damages it may award.

* * * * *

APPENDIX J

STATE OF ALABAMA
IN THE CIRCUIT COURT
FOR THE COUNTY OF MONTGOMERY
FIFTEENTH JUDICIAL CIRCUIT
CIVIL

CIVIL ACTION NO. CV-87-448-G

DEBBY D. CLARDY, in her representative capacity as Executrix of the estate of Thomas Eugene Clardy; CLARDY REALTY, INC.,

APPELLANT,

VS.

MARTHA HOFFMAN SANDERS, Mother of NORA DAVIDSON HOFFMAN, deceased minor,

APPELLEE.

* * * * *

BEFORE: The HONORABLE JAMES T. GULLAGE, Judge presiding, in Courtroom Number Three of the Lee County Justice Center, at Opelika, Alabama, on the 31st day of March, 1988, beginning at approximately 9:45 AM, and being concluded at approximately 12:05 PM on the same date.

* * * * *

APPEARANCES:
FOR THE APPELLANT: MICHAEL B. BEERS, Esq.,
Attorney at Law
Montgomery, Alabama, and
JULIAN P. HARDY, Esq.,
Attorney at Law

Birmingham, Alabama

FOR THE APPELLEE: RICHARD M. JORDAN, Esq.,
and
RANDLE AL MYERS, Esq.,
Attorneys at Law
Montgomery, Alabama

Julian P. Hardy, Esq.
Attorney at Law
Birmingham, Alabama

* * * * *

with respond et superior, scope of employment on business and for the same reasons we've argued that there should be JNOV for Clardy Realty, Inc., we say that this charge obviously should not have been given those three charges. These are plaintiff's requested charges, 25, 26 and 27.

THE COURT: Okay.

MR. HARDY: The other issue, legal issue, we would like to take up at this time and I will not spend an awful long time on it, Your Honor, is the constitutional issue. You have—the Court has expressed its feelings about that throughout the trial at each juncture when that was raised.

THE COURT: Yeah. I remember that issue.

MR. HARDY: And my recollection—well, I won't try to say what my recollection is of the Court's feelings—

THE COURT: I'll put it on the record here, and I don't think that I am in a position to decide that that is unconstitutional.

MR. HARDY: Yes, sir. But if I could just briefly, I would like to get in the record.

THE COURT: Well, y'all argued that from the very first.

MR. HARDY: I would like to just briefly point out to the Court, and for the record, and the Court, I feel certain, is aware and probably has had argued to it before, *Aetna v. Lavoie* in 1986. The United States Supreme Court said, and there was a 3-1/2 million dollar verdict in Mobile and—

THE COURT: Talking about excessive fines is unconstitutional, is what you're arguing. Correct?

MR. HARDY: Well, due process and excessive fine, but the United States Supreme Court even though they decided this case on a different grounds saying Justice Emory

should have recused himself from hearing the case, specifically noted *Aetna's* argument was that the lack of standards governing punitive damage awards in Alabama violate the due process clause raises an important issue which must be resolved. They decided that case on another ground, but obviously felt that was an important enough issue and had enough concern about it to make that statement. I would only point out to the Court that that issue is now before the Supreme Court.

Bankers Life and Casualty Co. v. Crenshaw was argued in the United States Supreme Court back in November of '87. It is presently under submission, and an opinion, an issue will be forth coming, I don't know exactly when; but the case has been under submission for that amount of time. In the Alabama Supreme Court the identical issue that we have raised throughout this trial is now pending in several cases, but in one case, in particular, I know *Industrial Chemical & Fiberglass Corp. v. Chandler,* which the Alabama Supreme Court has been holding since October of '87, the month before *Bankers Life* was argued in the United States Supreme Court, it's a wrongful death action involving a five million dollar punitive damage judgment. The constitutional issues have been raised by both excessive fines under the state and United States constitution, as well as the due process. It may be that also, I don't know if equal protection was raised in *Industrial Chemical* or not. We also raise that third constitutional ground in Clardy, in this case. For the Court's information, I would also just point out that this issue has recently as last week worked its way through the Georgia courts, and, in a case styled—released just this month, March of '88, *Colonial Pipe Line Co. v. Brown*—I don't know whether you have this decision yet or not, Your Honor. I'm informed that you do.

THE COURT: Somebody sent me a copy of—a xeroxed copy of an opinion of the Georgia court. But I don't know whether that is the same opinion or not.

MR. BEERS: I sent that, Your Honor.

MR. HARDY: Well, it's *Colonial Pipe Line Co. v. Brown* where the issue finally was heard and decided by the Georgia Supreme Court. In that case there had been a fifty-two thousand dollar judgment at the trial court level for actual damages and a five million dollar punitive damage award.

THE COURT: Is this about the tractor running over the pipeline and this—

MR. HARDY: Yes, sir. That's correct. That's correct. The—apparently the defendant's in this case from reading the opinion raised both the constitutional issues involved in excessive fines clause of the 8th amendment and the—

THE COURT: Okay. Let me ask you a question there.

MR. HARDY: Yes, sir.

THE COURT: Georgia's statute for wrongful death is not punitive in nature, though it is compensatory, isn't it?

MR. HARDY: That's my understanding.

THE COURT: Well, this case involved personal injury in which they applied large punitive damage.

MR. HARDY: This is a property damage case here.

THE COURT: Yes, sir.

MR. HARDY: This is property.

THE COURT: The excess—the amount wasn't it for injury to the guy—well, the tractor burned up I guess.

MR. HARDY: My understanding this was strictly a property damage case from reading of the case. But whether it was property damage or personal injury, the constitutional argument is the same in both cases.

THE COURT: Yeah. I understand.

MR. HARDY: And in this case the defendant challenged the punitive damage award under the excessive fines clause of the 8th Admendment of the United States Constitution, as well as apparently Georgia State Constitution, as does Alabama have a similar provision. They also raised the due process argument but Georgia Supreme Court, because of its ruling and decision based upon the excessive fines argument did not reach the due process. In any event, on the constitutional issues the Georgia Supreme Court now has reversed the five million dollar punitive damage award based on the same constitutional issue that we raised in this case. That *Aetna* raised before the Supreme Court in '86, that *Bankers Life and Casualty Co.* has argued before the United States Supreme Court, and that several other defendants have argued, and now it is pending before the Alabama Supreme Court. I do not know, frankly, in looking at the *Brown* decision; although the Court went off on excessive fines, I don't know what the Court anticipated would be the further proceedings in this case. I suppose if it had been decided in the due process clause that punitive damages were, in fact, violation of the due process clause it may have reduced the punitive damages to zero, and I don't know if under Georgia Law they would have had any other vehicle for religating or pursuing that. Under the excessive fines clause where they have decided evidently the Georgia Supreme Court decided that it may be left open for them to religate the amount of damages. I just do not know, but in any event the punitive damage award was reversed on the constitutional issue. Again, I understand the Court has expressed his feelings about its position regarding this issue. If there are any other specific questions about the constitutionality of the punitive damages in Alabama, and under the Alabama death statute which the Alabama Supreme Court has said—

THE COURT: As I understand the law now, the present decisions of the Alabama Appellate Court is that that law is constitutional. I don't have any—you can't cite me a

case anywhere that says it is unconstitutional other than the Georgia case, can you?

MR. HARDY: I don't know that they say it is constitutional.

THE COURT: Well, I mean it is been the way that Alabama has proceeded for the last hundred years or—

MR. HARDY: That's whats pending right now. Whether it is constitutional.

THE COURT: Yeah. Surely.

MR. HARDY: I would just mention that in the case Mr. Jordan mentioned in his letter yesterday, March 30, 1988, *Blackbelt Wood Company v. Sessions*, he cites it on the issues of excessiveness apportionment of damages. That was a three and a half million dollar punitive damage award death case. Of course, there's a big difference in *Blackbelt*. I mean, as I recall, they were two corporate defendants and one individual defendant, where there was no JNOV in that case, for the corporate defendant to the three and a half million dollar verdict; and leaving it intact against individuals. That case is certainly no authority, or certainly is easily distinguishable on that basis, in terms of the size of the verdict and the fact that it was not cut in that case apparently by Judge Hughes in Jefferson County. If you read the testimony in that case from Judge Hughes on rehearing in *Hammond*, evidently there was no evidence really put on by the defendant in that case, with regard to the *Hammond* criteria concerning excessiveness of the verdict—

MR. BEERS: Your Honor, if I could interrupt Pat, at this moment, and answer to your last inquiry as to whether or not we can point you to a case where the Alabama Supreme Court has held the death statute unconstitutional, I would only alert the Court that the Alabama Supreme Court has never had the opportunity to rule on it with regard to these constitutional issues.

THE COURT: Okay. But the matter is apparently presently pending.

MR. HARDY: That's what I say. It is presently pending, Your Honor. That's as I've stated in any number of cases, but in a similar wrongful death case five million dollar—the *Chandler* decision. But the *Blackbelt Wood Company* case also, I think, points out the defendant never raised the constitutionality of the punitive damage award in that case. Never raises it. Obviously, it is not addressed; but again, in terms of excessiveness Mr. Jordan says that a case where there is an award against corporate individual defendants that it was properly submitted to the jury with respect to all of those as authority in dispositive of the possibility that this case could be excessive, if you assume the corporation should not have been submitted to the jury. I think thats that's reaching.

THE COURT: Okay. You want to answer that?

MR. JORDAN: Well, the very essence of *Blackbelt* was it was just simply unfair. The *Blackbelt* to have to pay to be jointly liable for this big judgment when they had gotten out of the first trial and even the judgment in the first case wasn't but two hundred and fifty thousand dollars. They took a forty page opinion to trace the death action all the way back to 1852 and brought it all the way forward. They specifically refused to adopt the concept of apportionable damages. I don't think they understand that in that case everybody was found guilty, just like here. They had individual defendants' trial, they had the trucking company, they had the company that loaded it; that's the whole purpose for joint and severable liability. They could vest that judgment of three and a half million dollars upon the truck driver, if they so choose; so, as to excessiveness, they followed the letter of the law on *Hammond* that unless you can predicate—unless that trial judge can find a specific finding that that judgment was corrupt, that it was tained by bias, prejudice, passion or other miscon-

duct, it constitutionally must be maintained in its integrity. You can't just substitute your opinion for those. *Blackbelt* is the leading case, in my opinion, and it is less than a year old; and for them to say that its distinguishable all I say is this—if the rule is really the enormity of the wrong, the wrong in *Blackbelt* is paled in comparison to the wrong in the Clardy case.

MR. HARDY: Just one other point, Your Honor. Mr. Jordan was using the term loosely—constitutional; there is no constitutional issue raised in *Blackbelt*. He said something about the verdict and the damage or constitutional. That issue has not been decided—

MR. JORDAN: Well, I said the verdict has constitutional protection. That's a constitutional provision.

THE COURT: Okay. That's fine. Go ahead.

MR. HARDY: All right, sir. Of course, the difference Mr. Jordan doesn't seem to want to give me any slack on is that in *Blackbelt* there was a verdict against all of the defendants. I concede there was, and he said in this case there was a verdict against all of the defendants. I concede that too.

APPENDIX K

IN THE SUPREME COURT OF ALABAMA

NO. 87-1070

DEBBY D. CLARDY, as the Executrix of the Estate of Thomas Eugene Clardy, deceased, and CLARDY REALTY, INC.,

Appellants,

vs.

MARTHA HOFFMAN SANDERS,

Appellee.

ON APPEAL FROM THE FIFTEENTH JUDICIAL CIRCUIT OF ALABAMA

BRIEF OF APPELLANTS

ORAL ARGUMENT REQUESTED

Of Counsel:

Beers, Anderson, Jackson & Smith, P.C.
272 Commerce St.,
Suite 210
Montgomery, AL 36104
(205) 834-5311

Michael B. Beers
Julian P. Hardy
Karon O. Bowdre
Deborah Alley Smith

ATTORNEYS FOR APPELLANTS

Pritchard, McCall, Jones,
Spencer & O'Kelley
901 Brown Marx Tower
Birmingham, AL 35203

Rives & Peterson
1700 Financial Center
Birmingham, AL 35203
(205) 328-8141

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III.

THE $2,750,000 PUNITIVE DAMAGE AWARD IMPOSED IN THIS CASE IS FUNDAMENTALLY OFFENSIVE TO GUARANTEES CONTAINED IN THE ALABAMA AND UNITED STATES CONSTITUTIONS

Alabama's Constitution and the Constitution of the United States both provide that no individual shall be deprived of property without due process of law, and that excessive fines shall not be imposed. Ala. Const. of 1901, Art. 1, §§ 6, 15; U.S. Const., Fifth Amendment, Eighth Amendment, Fourteenth Amendment. These provisions were violated in this case by the authority granted to and exercised by the jury to award punitive damages, to impose a fine to punish and deter, without *any* legislatively determined or judicially articulated clear standards as to whether a fine was warranted or the amount of or limits of any such punishment.[3]

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[3] Defendants first raised these constitutional challenges to the imposition of any punitive damages in this case in their Amended Answer. They reiterated these challenges at the charge conference and repeated them in their Motion For Directed Verdict. Defendants continued their constitutional objectives after the court had charged the jury and, after the jury's verdict, raised them once again in Defendants' Motion for JNOV or, in the Alternative, Motion for New Trial. *See supra*, pp. 2-4.

[30] The Supreme Court of the United States has expressed concern that the standards governing punitive damage awards are often "ill-defined." *See, e.g., Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 780, n.4 (1985) (Brennan, J., dissenting, joined by Marshall, Blackmun, and Stevens, JJ.); *Smith v. Wade*, 461 U.S. 30, 59 (1983) (Rehnquist, J. dissenting). In 1986, the Court expressly stated that this absence of standards raised "important [constitutional] issues which, in an appropriate setting, must be resolved. . . ." *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 828-29 (1986). And only recently, Justice O'Connor, joined by Justice Scalia, observed at greater length that the power of the juries "to award any amount of punitive damages in any tort case in which a defendant acts with a certain mental state . . . may violate the Due Process Clause." *Bankers Life & Casualty Co. v. Crenshaw*, 108 S. Ct. 1645, 1655 (1988) (O'Connor, J., concurring in part and concurring in the judgment).

These constitutional concerns arise from the unique qualities of punitive damages in our legal system. This Court has made clear that punitive damages are awarded to serve the [31] governmental function of punishing conduct perceived as antisocial in order to achieve the twin goals of retribution and deterrence. *Tatum v. Schering Corp.*, 523 So. 2d 1042, 1044 (Ala. 1988); *City Bank of Alabama v. Eskridge*, 521 So. 2d 931, 933 (Ala. 1988); *Fruehauf Corp. v. Welch*, 519 So. 2d 502, 506 (Ala. 1988); *Deaton, Inc. v. Burroughs*, 456 So. 2d 771, 776 (Ala. 1984). Instead of supplying the jury with standards to guide the determination whether to impose punitive damages, § 6-5-391 of the Alabama Code, pursuant to which the $2,750,000 punitive damage award in this case was imposed, authorizes the imposition of an unlimited, punitive award for *any* negligent act causing the death of a minor child. Ala. Code § 6-5-391 (1986). This Court has consistently held that the damages recoverable under § 6-5-391 are purely punitive in nature, with no compensatory or actual damages com-

ponent. *See, e.g., Eich v. Town of Gulf Shores*, 293 Ala. 95, 300 So. 2d 354, 356 (1974). The jury was so instructed in this case, notwithstanding defendants' objection to this jury charge on the grounds that Alabama's system for imposing punitive damages is unconstitutional. (RT. 853-54, 868-870, 873-74, 885-87). Damages under § 6-5-391 do not differ in this regard from damages under Alabama's Wrongful Death Act, which are also purely punitive. *See Consolidated Freightways, Inc. v. Pacheco-Rivera*, 524 So. 2d 346, 352 (Ala. 1988); *Tatum*, 523 So. 2d at 1045; *Deaton*, 456 So. 2d at 776.

[32] **A. The Punitive Damage Award Resulted from a Standardless Exercise of Arbitrary Power That Violated Defendants' Rights to Due Process Under the Alabama and Federal Constitutions**

The standards governing the award in this case were not merely ill-defined, they were virtually undefined. Section 6-5-391 authorizes a plaintiff to recover punitive damages in any amount "as the jury may assess" for any "wrongful act, omission or negligence" resulting in the death of a minor. Thus, there were *no* articulated standards of conduct, beyond the avoidance of ordinary negligence, which defendants could have followed in order to avoid the imposition of punitive damages. (The "negligence" and "wrongfulness" standards found in the statute add nothing to the common law duty of reasonable care to which all members of society are required to conform.) The damage award in this case therefore violated the Due Process Clause of the Fourteenth Amendment as interpreted by the Supreme Court in cases such as *Giaccio v. Pennsylvania*, 382 U.S. 399 (1966).

In *Giaccio*, the Court struck down under the Due Process Clause a Pennsylvania statute under which a jury, having acquitted a criminal defendant, was authorized to award court costs against the defendant. The Court condemned the statute as "leav[ing] to the jury such broad

and unlimited power in imposing costs . . . that the jurors must make determinations of the crucial issue upon their own notions of what the law should be . . . ." 382 U.S. at 403. The Court held that a system which imposed *punishments* based upon *"loose* [33] *and unlimiting terms"* would certainly "fail to measure up to the requirements of the Due Process Clause." 382 U.S. at 404 (emphasis added). Similarly, Justice O'Connor has recently observed that where a state authorizes a system by which "the determination of the amount of punitive damages is a matter committed solely to the authority and discretion of the jury," this amounts to a "grant of wholly standardless discretion to determine the severity of punishment [which] appears inconsistent with due process." *Bankers Life and Casualty Co. v. Crenshaw*, 108 S. Ct. at 1656 (O'Connor, J.) (internal quotation marks omitted). In reaching this conclusion, Justice O'Connor noted that punitive damages, like criminal punishments, are imposed to punish and deter, 108 S. Ct. at 1655, and that the Court had previously recognized that "vague sentencing provisions may pose constitutional questions if they do not state with sufficient clarity the consequences of violating a given criminal statute." 108 S. Ct. at 1656, *quoting United States v. Batchelder*, 442 U.S. 114, 123 (1979).

The imposition of a $2,750,000 punitive fine by the jury in this case simply cannot withstand scrutiny under the foregoing due process standards.

B. The Subjection of Defendants to Unlimited Monetary Punishment under Ala. Code § 6-5-391 Is Fundamentally Offensive to Concepts of Due Process Embodied in the Due Process Clauses of the Alabama and United States Constitutions

As appellants demonstrate below in part III. C., the functional equivalents of modern-day punitive damage [34] awards—amercements and fines—arose within the context of the English legal system under which the maximum

potential penalty was generally known in advance, having been established by local rule, custom, or statute. This fundamental principle—that limits on punishments must be prescribed in advance of their imposition and that such limits may not be set by juries on an *ad hoc* and *post hoc* basis—has roots in the ancient Latin canon, "Nullum crimen, nulla poena, sine lege," the modern translation of which is: "there can be no crime, *and no punishment*, except as the law prescribes it." M. Frankel, *Criminal Sentences* 3 (1972) (emphasis in original). The bed rock principle that the crime and the punishment must be prescribed and known has led to the codification of the criminal law and the rejection of the concept of common law crimes in this country.[4] Indeed, at and around the time of the ratification of the Fourteenth Amendment in 1868, the several States had already enacted comprehensive penal codes which supplanted the notion of the [35] common law crime. When these codes imposed monetary punishment, they typically did so by way of specified maximum fines.[5]

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[4] The concept of common law crime at the federal level had been rejected by the Supreme Court early in the 19th Century, the Court stating that prior to prosecution of a federal offense, Congress "must first make an act a crime [and] affix a punishment to it . . . ." *United States v. Hudson*,11 U.S. (7 Cranch) 31, 34 (1812).

Aside from the punitive damages system, the only context in which punishment is still administered in our judicial system in the absence of pre-established limits is in connection with the courts' exercise of their inherent contempt power. The Alabama legislature, recognizing the dangers posed by limitless judicial power, has limited the maximum fine that a Circuit Court may impose for criminal contempt to $100. Ala. Code § 12-11-30(5) (1986).

[5] In enacting such comprehensive penal codes, the States rejected the notion of open-ended, potentially unlimited punishments. The codification of criminal offenses with fixed maximum punishments throughout the States at and around the time of the ratification of the Fourteenth Amendment demonstrates the depth and breadth of the consensus among the several States on this question. *See, e.g.*, Ala. Penal Code chs. 1-10 (1866) (punishing variety of offenses, including forgery, coun-

The virtually complete rejection in this country of the potential for unlimited, jury-imposed fines in criminal cases supports a similar rejection under Article I, § 6 of the Alabama Constitution and the Due Process Clause of the Federal Constitution of unlimited, jury-imposed punitive fines in civil cases[6] because no principled constitutional distinction may [36] be drawn between fines which are imposed to punish and deter based upon whether they are labeled "criminal" or "civil." The protection of the Due Process Clause "is not to be avoided by the simple label the State chooses to fasten on its conduct or its statute." *Giaccio v. Pennsylvania*, 382 U.S. at 402.

Notwithstanding the Due Process violation posed by the imposition of potentially unlimited punitive damage awards. such awards generally escaped scrutiny under the Due Process Clause during the 19th Century. This occurred because the rationales that supported punitive damages were as yet murky and confused during that period. Pu-

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terfeiting, larceny, embezzlement, murder, robbery, burglary, and arson); *see id.* §§ 91, 92, 101, 102, 104-110, 118, 123, 129, 130, 135, 136, 138, 140, 144, 148, 153-155, 157-159, 162, 177-184, 186-190, 192-207 (imposing maximum fines for a variety of offenses). A listing of similar statutes of other States is included as an Addendum at the conclusion of this brief.

[6] If States were constitutionally free to allow juries to impose unlimited punishments on persons convicted of crimes, the Ex Post Facto Clause, Art. I, §10, cl. 1, as it applies to the sentencing of criminal offenders, would be emasculated. As illustrated by the Supreme Court's unanimous decision in *Miller v. Florida*, 107 S. Ct. 2446 (1987), the Court has assumed, at least since its decision in *Calder v. Bull*, 3 Dall. 386 (1798), that no person could be punished for the commission of an offense deemed "criminal" unless an upper limit on the punishment had been announced prior to the commission of the acts leading to conviction. And although the Ex Post Facto Clause generally applies only to legislatively imposed punishments, the Supreme Court has not hesitated to invoke the Due Process Clause of the Fourteenth Amendment to strike down criminal convictions obtained as the result of judicial action broadening the statutory definition of a crime. *See Bouie v. City of Columbia*, 378 U.S. 347 (1964).

nitive damages were alternately viewed as a component of compensatory damages, as extra-compensatory, or as simultaneously compensatory and punitive. This ambiguity had the effect of discouraging or even foreclosing any meaningful analysis of the constitutionality of punitive damages.

The term "exemplary damages" was first used in the case of *Huckle v. Money*, 2 Wils. K.B. 205, 95 Eng. Rep. 768 (C.P. 1763). In *Huckle*, the jury had awarded 300 pounds in damages against a magistrate found to have falsely imprisoned the plaintiff. Although the court evaluated actual damages at no more than 20 pounds, it refused to set aside the verdict. The court reasoned that the jury's award must have been based on the spectre of "a magistrate over all the King's subjects, exercising arbitrary power . . . , " 2 Wils. K.B. at 207, 95 Eng. Rep. at 769, and the corresponding need to control such behavior through the imposition of a large judgment.

[37] In refusing to reduce the award, the court in *Huckle* assumed that it had very little, if any, authority to second guess the size of the jury's verdict, treating the jury's award as a verdict for actual damages and observing "that it is very dangerous for the Judges to intermeddle in damages for torts." 2 Wils. K.B. at 207, 95 Eng. Rep. at 769.[7] This assumption is consistent with the limitation on excessive amercements (fines) in Magna Carta because those limitations were not believed applicable to amercements or punitive fines imposed on "those who have administration of justice . . . ." *Griesley's Case*, 8 Co. Rep. 38a, 40a, 77 Eng. Rep. 530, 534 (C.P. 1588).

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[7] In the late 19th Century, it was observed that the reasoning of the early "exemplary" damage cases in England and the United States "amount[ed] to no more than a refusal to set aside" the large awards being returned by juries which could not be explained solely by reference to what "actual" damages had been sustained by the plaintiff. W. Hale, *Handbook on the Law of Damages* §§ 87-88, at 302 (2d ed. 1912).

"Exemplary" damages were extended after *Huckle v. Money* beyond cases involving government officials to deter individuals from seeking personal revenge for a wrong done to them by other private persons. *See Merest v. Harvey*, 5 Taunt. 442, 128 Eng. Rep. 761 (C.P. 1814); *Grey v. Grant*, 2 Wils. K.B. 252, 95 Eng. Rep. 794 (C.P. 1764). Initially, the reasoning offered by the English courts to justify their allowance of "exemplary" or punitive damages payable to plaintiffs who had been wronged by other private persons was confused. Sometimes this practice was explained in terms of compensation for [38] "intangible wrongs." *See, e.g., Tullidge v. Wade*, 3 Wils. K.B. 18, 95 Eng. Rep. 909 (C.P. 1769) ("public" nature of tort occasioned greater actual damages). Such non-punitive rationales gradually faded in the 19th Century as English courts expanded the content of "actual" damages to comprehend "intangible" harm such as emotional distress. *See, e.g., Andrews v. Askey*, 8 Car. & P. 7, 173 Eng. Rep. 376 (C.P. 1837).

The result of the expansion of actual damages to include recovery for pain, distress, emotional suffering and the like was to remove the initial "compensatory" rationales for punitive damages. This in turn led to the courts' recognition that the *only* remaining justifications for verdicts in excess of actual damages suffered by the plaintiff were punishment and deterrence—the precise rationale under which amercements had been justified in the English legal system.

The purely "punitive" purposes of punitive damage awards gradually began to be recognized in the United States only in the 1860s. In the early and middle portions of the 19th Century, American "punitive damage" cases were plagued by the same ambiguity that characterized the British cases of that era. Some decisions apparently deemed punitive damages to be purely compensatory, designed to compensate plaintiffs for intangible, non-pecuniary losses, while others concluded that [39] punitive

damages were both punitive and compensatory.[8] Beginning largely in the 1860s and 1870s, courts began to view punitive damage awards as solely punitive.[9] This development resulted from the gradual expansion in the United States (as in England) of the concept of actual damages to include compensation for intangible injuries such as mental anguish, leaving "nothing for 'exemplary damages,' as formerly understood, to operate upon . . . ." *Fay v. Parker*, 53 N.H. at 384. Thus, "exemplary" damages came to be understood "to refer to criminal punishment for the sake of public example . . .," *id.*, or as "punishment, and to preserve the public tranquility." *Hawk v. Ridgway*, 33 Ill. 473, 475 (1864).

As a result of these shifting, inconsistent characterizations of punitive damage awards, litigants appear not to have argued that such unlimited awards are constitutionally unacceptable punishments. *See, e.g., Chiles* [40] *v. Drake*, 59 Ky. 146 (1859) (concluding that punitive damage awards do not violate constitutional guarantees against double jeopardy because punitive damages are compensatory as well as punitive); *Parker v. Mise*, 27 Ala. 480, 483 (1855); *Dearing v. Moore*, 26 Ala. 586, 589 (1855); *but see Fay v. Parker*, 53 N.H. 342 (1872) (holding punitive dam-

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[8] *See, e.g., Slater v. Sherman*, 68 Ky. (5 Bush) 206 (1868); *Freidenheit v. Edmundson*, 36 Mo. 226 (1865); *Ellsworth v. Potter*, 41 Vt. 688 (1869); *Carey v. Bright*, 58 Pa. 70 (1868); *Chiles v. Drake*, 59 Ky. 146 (1859); *Austin v. Wilson*, 4 Cush. 273 (Mass. 1849); *Davidson v. Goodall*, 18 N.H. 423 (1846); *McNamara v. King*, 7 Ill. (2 Gilm.) 432, 436 (1845); *Linsley v. Bushnell*, 15 Conn. 225 (1842); *Sanborn v. Neilson*, 4 N.H. 501 (1828).

[9] *See, e.g., Alabama Great Southern R.R. v. Sellers*, 93 Ala. 9, 9 So. 375 (1891) ("The true theory of exemplary damages is that of punishment, involving the ideas of retribution for willful misconduct, and an example to deter others from its repetition."); *Railroad v. Williams*, 55 Ill. 185 (1870); *Fay v. Parker*, 53 N.H. 342 (1872); *Woodman v. Nottingham*, 49 N.H. 387 (1870); *Taylor v. Grand Trunk Railway*, 48 N.H. 303 (1869); *Barnet v. Reed*, 51 Pa. 190 (1867); *Dibble v. Morriss*, 26 Conn. 416 (1857).

ages unconstitutional on a number of due process grounds). It is not surprising that litigants during this era seldom seem to have raised constitutional objections to punitive damage awards.

Although the purely "punitive" purposes of punitive damage awards in the United States began to be generally recognized only in the middle of the 19th Century, the theoretical basis for these awards remained, and continues to remain, unchanged from the early 13th Century when such awards were subjected to control by the limitation on excessive amercements under Magna Carta. The doctrine was, in the late 19th Century, "well characterized as 'a sort of hybrid between a display of ethical indignation, and the imposition of a criminal fine.' " W. Hale, note 7 *supra*, at 303.

While the Due Process Clauses of the Alabama and Federal Constitutions undoubtedly permit sentencing authorities, whether they be judges or juries, considerable leeway in arriving at an ultimate determination regarding the appropriate level of punishment to be imposed in a particular case, this discretion is permitted in practice in criminal cases only where it has been circumscribed by outer [41] limits.[10] Those outer limits on potential punish-

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[10] As Blackstone observed, ideally

> a scale of crimes should be formed, with a corresponding scale of punishments, descending from the greatest to the least: but if that be too romantic an idea, yet at least a wise legislator will mark the principal divisions, and not assign penalties of the first degree to offenses of an inferior rank.

4 W. Blackstone, *Commentaries on the Laws of England* 18 (1809). As Blackstone implicitly recognized, the task of ascertaining the level of society's approbation of particular antisocial conduct is quintessentially a legislative task. The establishment of a maximum penalty for particular conduct locates that conduct within the spectrum of conduct—from undesirable to heinous—which society attempts to eliminate or control through the imposition of punishment.

ment may be known to all persons, and the amount imposed within such limits may readily be subjected to the constraints on excessive or disproportionate punishments found in the Eighth Amendment and Art. I, § 15 of the Alabama Constitution. Due Process prohibits a system of unlimited punishments in which the amount imposed is calculated *post hoc* on an *ad hoc* basis in each case without any legislatively defined outer limits. Until such time as the Alabama legislature enacts appropriate limits, this Court is constitutionally prohibited from allowing punitive damages to be levied under the authority of § 6-5-391.

* * * * *

[51] **D. The Indiscriminate Imposition of Identical Punitive Damage Awards Against Each Defendant Without Regard to Culpability Violates the Due Process and Excessive Fines Clauses**

The jury in this case was instructed, over defendants' objections, that if they were to find for plaintiff, a single punitive damage award should be imposed on all defendants. (RT. 836-37, 852, 870.) The constitutional considerations discussed above, however, required the jury to apportion any punitive damages among defendants according to each defendant's level of culpability.

Due process prohibits granting juries the unfettered power to impose financial sanctions in an arbitrary fashion. *Giaccio v. Pennsylvania*, 382 U.S. at 403. Similarly, the Excessive Fines Clauses of the United States and Alabama Constitutions prohibit the imposition of fines, whether labelled "civil" or "criminal," that are disproportionate to the offense in question. By prohibiting the jury from [52] considering the varying degrees of culpability of the various defendants, the instruction at issue required the jurors to impose a single punitive damage award against each defendant, with each being jointly and severally liable for the entire award. The imposition of punitive damages in

such a manner was clearly arbitrary and prevented the jury from imposing punitive damages that were proportionate in amount to the culpability of each defendant. Consequently, the $2,750,000 fine in this case violates the Due Process and Excessive Fines clauses.

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APPENDIX L

IN THE SUPREME COURT OF ALABAMA

SUPREME COURT
NUMBER 87-1070

DEBBY D. CLARDY, as the Executrix of the Estate of Thomas Eugene Clardy, deceased, and CLARDY REALTY, INC.,

APPELLANTS,

Vs.

MARTHA HOFFMANN SANDERS,

APPELLEE.

* * *

ON APPEAL FROM THE CIRCUIT COURT

OF MONTGOMERY COUNTY, ALABAMA

* * *

BRIEF AND ARGUMENT OF APPELLEE

* * *

RICHARD M. JORDAN
302 Alabama Street
Montgomery, Alabama 36104
205/265-4561

RANDY MYERS
302 Alabama Street
Montgomery, Alabama 36104
205/265-4561

W. SIDNEY FULLER
28 South Court Square
Post Office Drawer 1637
Andalusia, Alabama 36420
205/222-4196

ATTORNEYS FOR
APPELLEES

* * *

ORAL ARGUMENT HAS BEEN REQUESTED

* * * * *

[76] Contrary to the Appellants' contention, defendants in this case have had every vestige of due process afforded them in the conduct of this trial by an able, conscientious, careful and conservative Judge. It is ludicrous to argue that the Jury may not have the prerogative to assess damages in such amounts as they deem appropriate commensurate with the culpability of the wrongful act of the defendants in a death case. As a matter of fact, the Jury has the prerogative to assess such damages in injury cases and wherever permitted at common law. This particular verdict has been carefully scrutinized under common law principles by the Trial Court.

We concur with the statement quoted in Appellants' Brief at page 17, "that it is very dangerous for the Judges to intermeddle in damages for torts".

The upshot of defendants' argument here is that the Jury should not be allowed to assess damages in their discretion. A suggestion that jury trials be abolished in civil cases. However, we would note that the right of trial by jury must remain inviolate under the [77] provisions of Sections 11, Article I of the Alabama Constitution 1901. The U. S. Constitution by virtue of the 7th Amendment likewise guarantees a trial by jury in civil cases.

Amendment VII, Constitution of the United States (Trial by Jury in Civil Cases):

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of common law."

Article I, Alabama Constitution, 1901:

> "Sec. 11. Right to trial by jury.
>
> That the right of trial by jury shall remain inviolate."

The inviolate right to trial by jury has existed since the Magna Charta (June 15, 1215). *Alford v. State ex rel Atty. Gen.*, 170 Ala. 178, 54 So. 213 (1910):

> "Whatever may be the origin or true history of the jury trial, it is certain that, ever since the Magna Charta, the right to it has been esteemed a peculiar and inestimable privilege by the English race. For centuries this great charter has been appealed to, as the protector of the people against the encroachment of the prerogative or despotism of the sovereign. The English colonists who settled in America brought with them this love for and veneration of this cherished right. Alford v. State ex rel Attorney Gen., 170 Ala. 178, 54 So. 213 (1910)."

B. Here Appellants argue that the verdict was [78] unconstitutional because the amount of recovery is unlimited, i.e., no caps prevail under the Alabama Death Statute.

As noted in the history of the Death Act, the Legislature in creating the Death Act has this prerogative. However, the Act as written contains no caps and there is certainly no basis for a constitutional problem in this regard. We

submit that it is simply untrue that this Court is "constitutionally prohibited" from allowing punitive damages to be levied under the authority of Sec. 6-5-391 until the Alabama Legislature enacts limits or caps on the Death Act. The Alabama Wrongful Death Act is a legislative creature and as announced in the per curiam opinion in *Blackbelt* at 514 So. 2d 1250, 1263, n. 15, changes in the Act are matters for the Legislature. Particularly true now since the Legislature did not elect to alter the provisions of the Act at the time of the recent passage of the "tort reform" legislation.

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APPENDIX M

IN THE SUPREME COURT OF ALABAMA

NO. 87-1070

DEBBY CLARDY, in her representative capacity as Executrix of the Estate of Thomas Eugene Clardy, deceased, and CLARDY REALTY, INC.

Appellants

vs.

MARTHA HOFFMAN SANDERS, mother of NORMA DAVISON HOFFMAN, deceased minor

Appellee

APPPELLANTS' APPLICATION FOR REHEARING OR ALTERNATIVELY FOR STAY OF EXECUTION AND BRIEF IN SUPPORT THEREOF

Michael B. Beers
Julian P. Hardy
Karon O. Bowdre

Attorneys for Appellants

OF COUNSEL:

BEERS, ANDERSON, JACKSON & SMITH, P.C.
272 Commerce Street, Suite 210
Montgomery AL 36104

PRITCHARD, McCALL & JONES
901 Brown Marx Tower
Birmingham AL 35203

RIVES & PETERSON
1700 Financial Center
Birmingham AL 35203
Tel: 205/328-8141

ORAL ARGUMENT IS REQUESTED

* * * * *

[1] APPLICATION FOR REHEARING OR ALTERNATIVELY FOR STAY OF EXECUTION

Appellants Debby D. Clardy and Clardy Realty, Inc., petition this Court, pursuant to Ala.R.App.P. 40, for a reconsideration and rehearing on the appeal which this Court denied on June 23, 1989. The decision in this case should be re-examined in view of the opinion rendered by the Supreme Court of the United States on June 26, 1989 in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, No. 88-556, 57 U.S.L.W. 4985 (1989).

The various opinions in *Browning-Ferris*, together with those issued in *Bankers Life and Casualty Co. v. Crenshaw*, 486 U.S. ___, 108 S. Ct. 1645 (1988), reveal that five Justices of that Court have now expressed the position that the imposition of potentially unlimited punitive damage awards raises legitimate and serious questions under the Due Process Clause of the Fourteenth Amendment of the United States Constitution. Consequently, this Court should re-examine and carefully reconsider appellants' argument that the imposition of potentially unlimited monetary punishment under Ala. Code § 6-5-391 is fundamentally offensive to the Due Process Clauses of the Alabama and United States Constitutions. Upon rehearing, the Court should hold invalid the punitive award levied in this case.

Should this Court deny this Application for Rehearing, appellants request that the Court stay execution of the judgment against them. If rehearing is denied, appellants [2] intend to file a Petition for Writ of Certiorari in the Supreme Court. Appellants have posted and will maintain with the trial court a supersedeas bond sufficient to cover the judgment plus interest. Appellants request that the judgment of this Court be stayed until such time as the Supreme Court disposes of their Petition.

As grounds for said request, appellants rely on the brief submitted with this application.

[3] BRIEF IN SUPPORT OF APPLICATION FOR REHEARING

ARGUMENT

I. This Court should reconsider and reverse its holding that the imposition of potentially unlimited punitive damage awards does not violate the Alabama and United States Constitutions.

In its June 23, 1989 opinion, this Court summarily rejected all of appellants' constitutional challenges to the $2,750,000 punitive damage award imposed by the jury.[1] The opinion contains no express discussion of those constitutional challenges. The Court quoted in full the trial court's supplementary order denying appellants' post-judgment motions and announced simply that the Court found "no constitutional basis for reversal". *Clardy v. Sanders*, No. 87-1070, slip op. at 9-10 (June 23, 1989). The Court concluded by citing, without discussion, two of its recent decisions, *Industrial Chemical & Fiberglass Corp. v. Chandler*, Nos. 86-381, -385 [4] (June 23, 1989)(on rehearing), and *Central Alabama Electric Cooperative v. Tapley*, No. 87-1188 (May 12, 1989).

The Court's reliance on the trial court's post-trial order to reject appellants' constitutional arguments is entirely

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[1] Although the discussion in the text of this brief concentrates on the due process violation posed by the imposition of unlimited punitive damage awards, appellants, by this Application, hereby preserve each of the separate constitutional challenges advanced in their brief filed September 9, 1988 with this Court.

Further, reconsideration by this Court of this particular due process question should be made with regard to the fact that the punitive award was imposed on multiple defendants without any apportionment based upon the relative culpability of those defendants. As appellants have argued, this failure to apportion damages constitutes an independent violation of the Due Process Clauses of the Alabama and United States Constitutions and heightens the need for this Court's reconsideration of appellants' primary due process challenge to the punitive award at issue.

misplaced. The trial court's order, pursuant to the rule of *Hammond v. City of Gadsden*, 493 So. 2d 1374 (Ala. 1986), considered whether the punitive damage award is excessive as a matter of common law—not constitutional law. Moreover, this Court's reference to its decision in *Central Alabama* does not add materially to its summary rejection of the due process questions presented in this case because *Central Alabama* did not fully address these appellants' due process challenges to the imposition of unlimited punitive damage awards. In *Central Alabama*, the Court responded to the due process issue raised in that case by observing that:

(1) The amount of compensation to be awarded and the extent of punishment to be meted out have historically been "subjects unquestionably within the sacred domain of the jury", and have been subjected to constitutional attack only *"very* recently"; (2) punitive damages are the only damages available in an Alabama wrongful death action; (3) the American civil jury system "is the worst in the world—except for all of the rest" and has successfully been adapted to face new challenges; (4) a defendant is entitled to challenge a jury's verdict as excessive pursuant to common law principles by moving for remittitur and new trial, appealing from a denial of [5] either, obtaining *de novo* review of a jury verdict, or obtaining a *Hammond*-hearing, pursuant to which a trial court is "authorized" to consider questions such as whether the punitive damages awarded bear a reasonable relationship to the actual or likely harm; and (5) juries "should be entitled to punish defendants so severely as to destroy them", in the "rarest" cases. No. 87-1188, slip op. (unpaginated).

There is no evident nexus between the reasoning of the *Central Alabama* decision and the due process questions presented in the instant case. The immunity from constitutional scrutiny traditionally enjoyed by punitive damage awards, along with this Court's entirely appropriate respect for the civil jury system, do not respond to the

question whether a jury may be constitutionally permitted to impose punitive damage awards without statutory (or equivalent) limits on the amount of those awards. The fact that Alabama law provides for the award of only punitive damages in wrongful death cases does not establish that the imposition of wrongful death punitive damage awards absent statutory limitations comports with due process. Nor does it establish that the award of $2,750,000 in this case comports with the requirement of the Due Process Clause of the Fourteenth Amendment that the punishment be proportioned to the offense as measured by punishments imposed for similar offenses in Alabama. And, as noted above, the availability of post-trial procedures for the review of punitive damage awards is of no constitutional [6] significance—particularly in light of this Court's reluctance to invade the "sacred domain of the jury" in this area and in view of this Court's advance approval in *Central Alabama* of punitive damage awards that may "destroy" defendants.

This Court should undertake a more thorough analysis of the constitutional challenges raised by appellants. The need for rehearing on appellants' due process challenge to the imposition of unlimited punitive damage awards is particularly pressing in light of the Supreme Court's recent decision in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, No. 88-556, 57 U.S.L.W 4985 (1989).

As is clear from the *Browning-Ferris* decision and the Supreme Court's earlier decision in *Bankers Life and Casualty Co. v. Crenshaw*, 486 U.S. ___, 108 S.Ct. 1645 (1988), five members of the Supreme Court—Justices Brennan, Marshall, Stevens, O'Connor, and Scalia—have now authored or joined in opinions expressing serious constitutional reservations under the Due Process Clause of the Fourteenth Amendment with a system that permits the imposition of unlimited punitive damage awards. The Court made clear in its opinion in *Browning-Ferris* that it had never addressed "whether due process acts as a check on

undue jury discretion to award punitive damages in the absence of any express statutory limit". 57 U.S.L.W at 4990.

In addition, Justice Brennan's concurring opinion in *Browning-Ferris*, which was joined by Justice Marshall, expressly stated that the Court's opinion "leaves the door [7] open for a holding that the Due Process Clause constrains the imposition of punitive damages in civil cases brought by private parties." 57 U.S.L.W. at 4991 (Brennan, Jr., concurring). Justice Brennan pointed out that "[w]ithout statutory (or at least common-law) standards for the determination of how large an award of punitive damages is appropriate in a given case, juries are left largely to themselves in making this important, and potentially devastating, decision." 57 U.S.L.W. at 4992. Justice Brennan noted that punitive damages are typically imposed by juries "guided by little more than an admonition to do what they think is best," 57 U.S.L.W. at 4992, and concluded that because the " 'touchstone of due process is protection of the individual against arbitrary action of government,' " he "would look longer and harder at an award of punitive damages" based on typical "skeletal guidance" provided to juries than at "one situated within a range of penalties as to which responsible officials had deliberated and then agreed." 57 U.S.L.W. at 4992 (quoting *Daniels v. Williams*, 474 U.S. 327, 331 (1986)). However, because the due process questions in *Browning-Ferris* were not properly before the Supreme Court for procedural reasons, Justice Brennan chose to "leave fuller discussion of these matters for another day." 57 U.S.L.W. at 4992.

Justice O'Connor, in a separate opinion in *Browning-Ferris* joined by Justice Stevens, stated that she "shares Justice Brennan's view . . . that nothing in the court's opinion forecloses [8] a due process challenge to awards of punitive damages or the method by which they are imposed." *Browning-Ferris*, 57 U.S.L.W. at 4992 (O'Con-

nor, J., concurring in part and dissenting in part). Moreover, Justice O'Connor expressly adhered to the position she had previously expressed, along with Justice Scalia, that the power of juries "to award any amount of punitive damages in any tort case in which a defendant acts with a certain mental state . . . may violate the Due Process Clause." *Bankers Life and Casualty Co. v. Crenshaw,* 108 S.Ct. at 1655 (O'Connor, J., concurring in part and concurring in the judgment).

As demonstrated by the foregoing, the majority of the Justices of the Supreme Court of the United States have expressed the view that the absence of pre-established limits on the size of punitive damage awards presents a legitimate and compelling due process question. The instant case squarely presents this due process question. This Court should accordingly grant appellants' Application for Rehearing, apply a considered analysis to appellants' due process arguments, and hold that the imposition of the $2.75 million punitive damage award in this case violated the Due Process Clauses of the Alabama and United States Constitutions.

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